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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 258

AMERICAN WELL AND PROSPECTING COMPANY,

Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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July 12, 1956.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

AMERICAN WELL AND PROSPECTING COMPANY, *Petitioner,* *against* COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No. .....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, American Well and Prospecting Company, a Texas corporation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered March 22, 1956, which affirmed a decision of The Tax Court of the United States. A certified transcript of the record is furnished herewith in accordance with Rule 21, Pars. 1 and 3, of the Rules of this Court.

Opinions Below

The opinion of the Tax Court (R. 3a)* is reported in 23 T. C. 503. The opinion of the Court of Appeals (a

*Nine additional copies of the printed Appendix for the petitioner in the Court of Appeals are furnished herewith in accordance with Rule 21, Pars. 3 and 4, of the Rules of this Court. The record references are to that Appendix.

copy of which is appended to this petition as Exhibit A) is reported in 232 F. 2d 934.

Jurisdiction

The judgment of the Court of Appeals (a copy of which is appended to this petition as Exhibit B) is dated March 22, 1956, and was entered on that date. A petition for rehearing which was filed with the Court of Appeals on April 5, 1956, was denied on April 18, 1956. A copy of the order of denial is appended to this petition as Exhibit C. The jurisdiction of this Court is invoked under Title 28, United States Code, Judiciary and Judicial Procedure, Section 1254 (62 Stat. 928).

Questions Presented

1. If the petitioner, a Texas corporation, was in existence during 1946 (as found by the Tax Court), is it entitled to carry back to 1944 its unused excess profits credit for 1946 in the amount of $74,909.27 under the provisions of Section 710(c)(3)(A) of the Internal Revenue Code of 1939, although in 1946 it was not engaged in the business which produced its 1944 income against which the carry-back to 1944 would be applied?

2. Was the finding of the Court of Appeals that the petitioner was *de facto* dissolved and hence did not have any existence for Federal tax purposes in 1946 a proper one, particularly in view of the finding of fact by the Tax Court that the petitioner remained in existence in 1946 for a proper business purpose?

Statutes and Regulations Involved

The pertinent provisions of the statute and the regulations, namely, Section 710(b)(3), Section 710(c) and Section 712(a) of the Internal Revenue Code of 1939, Section 29.52-1 of Treasury Regulations 111, and Section 35.710-3(a) of Treasury Regulations 112, are printed in the Appendix, *infra*.

Statement

The facts were stipulated (R. 12a-18a) and may be summarized as follows:

The petitioner is a corporation organized in 1931 under the laws of Texas and is existing and presently engaged in business (R. 12a, 18a).

In 1931 through 1945, the petitioner was engaged in the business of manufacturing and selling oil well equipment and also in the manufacture of armaments for the United States Government (R. 13a). Since 1944, all the petitioner's outstanding stock has been owned by Bethlehem Steel Company, a Pennsylvania corporation, all the stock of which in turn has been owned by Bethlehem Steel Corporation, a Delaware corporation (R. 13a).

The petitioner's business was operated at a loss in 1945 (Exhibit 3-C).

As of the opening of business on January 1, 1946, the petitioner sold all its transferable property, assets and business for approximately $900,000 to Bethlehem Supply Company, a Delaware corporation, which was also engaged in the manufacture and sale of oil well equipment (R. 4a, 13a). The petitioner also agreed to collect its non-assignable assets and turn over the proceeds to Bethlehem Supply Company (R. 5a, 24a). All the outstanding stock of Bethlehem Supply Company was and is owned by Bethlehem Steel Corporation (R. 14a).

Among the non-assignable assets owned by the petitioner were certain claims against the United States in the amount of approximately $300,000 (R. 4a, 13a). The major part of those claims was collected in May and August of 1946 (R. 6a, 15a, 16a). A further claim of approximately $25,000 had not been collected at the time of the hearing (R. 6a, 16a). The Tax Court found that the petitioner on January 1, 1946, "ceased to operate a business but remained in existence to cooperate with the purchaser [of its assets] so that the latter might derive the benefit of certain contracts and claims that were unassignable" (R. 3a).

During 1946 and 1947, the petitioner was also engaged in settling claims by the United States against it (R. 16a); in purchasing and disposing of certain material and machinery owned by the United States, but located upon the property formerly owned by the petitioner (R. 16a); and in defending a suit for $219,000 brought against the petitioner in June, 1946, by a former employee which was not disposed of until 1948 (R. 17a).

The petitioner retained the $900,000 proceeds of the sale of its assets during the entire taxable years 1946 and 1947. It never made any liquidating distributions to its shareholders (R. 8a). No proceedings to dissolve the petitioner were taken (R. 15a).

The petitioner filed Federal income tax returns for 1946 and 1947 (Exhibits 4-D and 5-E).

Annual meetings of the petitioner's stockholders and meetings of its directors were held in 1946 and 1947 (R. 27a-47a).

In 1948, the petitioner invested part of the proceeds of the sale of its business in a drydock and has since been in the business of renting the drydock (R. 17a, 18a).

The jurisdiction of The Tax Court of the United States is based upon Section 272(a)(1) of the Internal Revenue Code of 1939.

Section 710(c)(3)(A) of the Internal Revenue Code of 1939 (set forth in the Appendix to this petition) provides that if a taxpayer has an unused excess profits credit for 1946, such unused credit "shall be an unused excess profits credit carry-back for each of the two preceding taxable years", in this case 1944 and 1945. The amount of the petitioner's unused excess profits credit for 1946 is not in dispute (R. 18a).

The Tax Court held that the petitioner was not entitled to a carry-back of unused excess profits credit from 1946 to 1944 on the ground that the petitioner was not engaged in 1946 in the business which produced the 1944 profits against which the carry-back of unused credit for 1946 was to be applied. In such a case the Tax Court held that the Congress did not intend to permit a carry-back (R. 10a). The Tax Court, however, expressly found that the petitioner "remained in existence" in 1946 in order to collect its unassignable claims (R. 3a).

The Court of Appeals affirmed the decision of the Tax Court, but upon the ground that the petitioner was not in existence during 1946, since it had been *de facto* dissolved in January, 1946 (pp. 6, 9).* In so doing, the Court of Appeals found (contrary to the finding of the Tax Court) that there was no business reason for continuing the petitioner's existence in 1946 (p. 9).

Reasons for Granting the Writ

1. The Court of Appeals has rendered a decision in conflict with the decisions of other Courts of Appeals on the same matter, namely, *Diamond A Cattle Co. v. Commissioner*, 50-2 USTC par. 9629 (10th Cir. May 17, 1950,

*References are to the opinion of the Court of Appeals (Exhibit A to this petition).

not yet officially reported), reversing 21 T. C. 1 (1953);* *Wier Long Leaf Lumber Co.* v. *Commissioner*, 173 F. 2d 549 (5th Cir. 1949) [as to the year 1943], reversing 9 T. C. 990 (1947); and *Boxman* v. *Glenn*, 84 F. Supp. 200 (W. D. Ky. 1949), *aff'd* 184 F. 2d 670 (6th Cir. 1950). Those decisions in the Tenth, Fifth and Sixth Circuits involved the exact question presented by the instant case, namely, whether a corporation which has disposed of the business from which it made profits in prior years can carry back to offset income of prior years in which the business was operated an unused excess profits credit for a period after it disposed of the business. Those three Courts of Appeals held that the carry-back provision was mandatory. They allowed the carry-back even though the corporations involved were avowedly in the process of liquidation. The business reasons for the continuation of the petitioner's existence in 1946 were at least as great as the reasons for the continued existence of the corporations involved in those three cases during the years from which carry-backs were permitted, and in which the corporations were held to be in existence and not to have been *de facto* dissolved.

2. This case presents a question of large and continuing importance in the functioning of the Federal tax laws which has not been, but should be, settled by this Court. That question is: When does a corporate taxpayer cease to be in existence for the purposes of the Federal tax laws? The question has been the subject of considerable litigation and has arisen in a number of different forms.

(a) One form which the question has taken is whether a corporation's existence has been terminated

*The Tax Court opinion in the *Diamond A Cattle Co.* case was written by the author of the Tax Court opinion in the instant case and is identical in reasoning with the latter opinion.

so as to bar its right to a carry-back of unused excess profits credit (the precise point involved in this case). The large number of cases in which the question has been litigated shows its importance.*

(b) Another form which the question has taken is whether a corporation's existence has been terminated during the period of its liquidation so as to bar its right to a carry-back of operating losses. *Acampo Winery & Distilleries, Inc.*, 7 T. C. 629, 639-40 (1946); and *Gorman Lumber Sales Co.*, 12 T. C. 1184, 1194 (1949), *supra*. Those cases hold that an operating loss of a liquidating corporation which has disposed of all its business assets that produced the income in prior years may be carried back to offset the income of those prior years.

(c) A further form which the question has taken is whether a corporation's existence has ceased for the purpose of terminating the taxable year. That question has been litigated in several cases with a result generally in conflict with the decision of the Court of Appeals in the instant case: *United States* v. *Kingman*, 170 F. 2d

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*In addition to the three cases previously cited, the question has also been litigated with varying results in the following cases: *A B C Brewing Corp.* v. *Commissioner*, 224 F. 2d 483 (9th Cir. 1955); *Jos. Capps, Inc.* v. *United States*, 86 F. Supp. 712 (S. D. Cal. 1949); *Eastern Grain Elevator Corp.* v. *McGowan*, 95 F. Supp. 40 (W. D. N. Y. 1950); *Justice Motor Corp.* v. *McGowan*, 97 F. Supp. 570 (W. D. N. Y. 1951); *Westover Co.* v. *Smyth*, 99 F. Supp. 488 (N. D. Cal. 1951) [for opinion see 51-2 USTC par. 66,019]; *Myers* v. *United States*, 52-1 USTC par. 66,031 (E. D. Ark. 1952); *Brainard* v. *Scofield*, 140 F. Supp. 754 (W. D. Tex. 1953); *Arizona Concrete Company* v. *Stuart*, 55-2 USTC par. 9545 (D. Ariz. 1955); *Rite-Way Products, Inc.*, 12 T. C. 475 (1949); *Gorman Lumber Sales Co.*, 12 T. C. 1184 (1949); *Winter & Company, Inc. (Indiana)*, 13 T. C. 108 (1949); *Whitney Manufacturing Co.*, 14 T. C. 1217 (1950); *Coca Cola Bottling Co.*, 19 T. C. 282 (1952); *Wheeler Insulated Wire Co., Inc.*, 22 T. C. 380 (1954); *cf. Aluminum Products Company* v. *United States*, 101 F. Supp. 373 (Ct. Cls. 1951).

408 (5th Cir. 1948); *Union Bus Terminal* v. *Commissioner*, 179 F. 2d 399 (5th Cir. 1950), affirming 12 T. C. 197 (1949); and *Commissioner* v. *Allegheny Broadcasting Corporation*, 179 F. 2d 844 (3rd Cir. 1950). Here again the Courts of Appeals have held that corporations with no more activity than that of the petitioner in 1946 in the instant case were not *de facto* dissolved so as to end their existence for Federal tax purposes.

(d) Still another form which the question has taken is whether a corporation's existence has been terminated so that an excess profits credit may not be used for later years, or operating losses of prior years may not be carried forward against income of later years, where there is an intervening period of comparative inactivity. *Great American Industries, Inc.*, 25 T. C. No. 133 (March 8, 1956); *Alprosa Watch Corporation*, 11 T. C. 240 (1948); *W A G E, Inc.*, 19 T. C. 249 (1952); *A. B. & Container Corporation*, 14 T. C. 842 (1950). See also *Mesaba-Cliffs Mining Co.* v. *Commissioner*, 174 F. 2d 857 (6th Cir. 1949). Here again the rationale of the cases is contrary to the decision of the Court of Appeals in the instant case.

(e) Another form which the question has taken is whether a corporation's existence has terminated for the purpose of determining whether it should have filed a return and whether certain income is taxable to it or to its shareholders. The Treasury Regulations have for many years provided that a corporation is in existence for Federal tax purposes and is required to file Federal income tax returns even though it ceases business and dissolves (whether *de facto* or *de jure*), if it retains valuable assets or claims. Thus, Section 29.52-1 of Treasury Regulations 111, effective during 1946, provides as follows:

> " . . . A corporation is not in existence after it ceases business and dissolves, *retaining no assets,* whether or not under State law it may thereafter be treated as continuing as a corporation for certain limited purposes connected with winding up its affairs, such as for the purpose of suing and being sued. If the corporation has valuable *claims* for which it will bring suit during this period, *it has retained assets, and it continues in existence. . . .*" (Emphasis added.)

Following that regulation, it has been held that a dissolved corporation which was engaged in liquidating its assets is still a "corporation" within the meaning of the Federal tax laws and is required to file returns and pay taxes. *O'Sullivan Rubber Company (in Dissolution)* v. *Commissioner*, 120 F. 2d 845 (2nd Cir. 1941). That regulation and the cases construing it are contrary to the decision of the Court of Appeals in the instant case.

3. The Court of Appeals in rendering its decision has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

When the petitioner on January 2, 1946, sold all its assignable assets to Bethlehem Supply Company, it had other assets in the form of claims against the United States which, because of the provision of 10 Stat. 170, as amended (Section 203, Title 31, United States Code), were not assignable; assignment of them rendered them absolutely void.* Accordingly, the petitioner agreed to collect the non-

*The relevant part of 10 Stat. 170, as amended, Section 203, Title 31, United States Code, reads as follows:

> "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders,

assignable claims which had arisen in its business and, when it had finished collecting them, to transfer the proceeds thereof to Bethlehem Supply Company. The problem of collecting non-assignable claims arises on a sale to a third party, such as Bethlehem Supply Company (*United States* v. *Shannon*, 342 U. S. 288 (1952)). If the petitioner had sold those claims to Bethlehem Supply Company on January 2, 1946, they would have become void. The petitioner had not finished collecting such unassignable claims by the end of 1946 (R. 13a, 16a, 17a, 24a).

The Tax Court found that the petitioner

> "remained in existence to cooperate with the purchaser [of its assets] so that the latter might derive the benefit of certain contracts and claims that were unassignable." (R. 3a)

The Commissioner of Internal Revenue accepted that finding in his brief which he filed with the Court of Appeals and incorporated it in his statement of the question involved on the appeal pursuant to Rule 24(2)(b) of the Rules of that Court, stating that the petitioner

> "remained in existence to cooperate with the purchaser so that the latter might derive the benefit of certain contracts and claims that were unassignable." (Br., p. 2)

The Tax Court's finding of fact that the petitioner remained in existence for the business purpose of cooperating with the purchaser of its assets in connection with the collection of non-assignable claims is supported by substantial evidence. The Tax Court found that the petitioner had

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or other authorities for receiving payment of any such claim, or of any part or share, thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. * * *"

claims against the United States, which arose out of the business it had formerly conducted, in the amount of approximately $300,000 (R. 6a). If the petitioner had sold them to Bethlehem Supply Company, they would have, under decisions of this Court, become void. The collection of non-assignable claims arising out of its business which it owned and which only it could collect was a part of the orderly winding up of the petitioner's affairs. Certainly, counsel for the petitioner could not properly have advised that the petitioner be dissolved prior to the collection of the non-assignable claims against the United States. Prior to the time all those claims were collected, the petitioner was actively engaged in another business.

The Court of Appeals disregarded the finding of the Tax Court that the petitioner remained in existence for a proper business purpose. The holding of the Court of Appeals is summed up in the following two sentences in its opinion (p. 9):

> "In any event, there could be only two reasons for keeping a corporation alive under the circumstances of the case at bar in 1946: to avoid taxes, or to have a spare corporate charter conveniently ready for use whenever desired by the parent corporation. Neither is a sufficient business purpose of the taxpayer to negate the Tax Court's finding that the taxpayer in the case at bar was not entitled to an unused excess profits credit carry-back from the tax year 1946."

The extent to which the Court of Appeals disregarded the finding of the Tax Court is also shown by the way in which it attempted to distinguish the cases relied upon by the petitioner as supporting the allowance of the carry-back. The Court of Appeals distinguished those cases on the ground that "the taxpayers involved were much more than corporate shells kept alive only for purposes of tax

evasion" (p. 8). As stated above, the Tax Court found that the petitioner was continued in existence for a proper business purpose and the statement by the Court of Appeals in its opinion that the petitioner was kept alive in 1946 for purposes of tax evasion was not even suggested by the Commissioner of Internal Revenue at any stage in the proceeding and is entirely unsupported in the record.

The disregard by the Court of Appeals of the proper business reason why the petitioner remained in existence during 1946, as found by the Tax Court, is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. *Commissioner* v. *Scottish American Investment Co., Ltd.*, 323 U. S. 119, 123-124 (1944). See also *Choate* v. *Commissioner*, 324 U. S. 1 (1945); *Wilmington Trust Co.* v. *Helvering*, 316 U. S. 164 (1942); *Helvering* v. *Kehoe*, 309 U. S. 277 (1940); and *Helvering* v. *F. & R. Lazarus & Co.*, 308 U. S. 252 (1939). That the Tax Court's finding was based on stipulated facts does not change the rule that it is an abuse of the power of appellate review to ignore the Tax Court's findings of fact. *Boehm* v. *Commissioner*, 326 U. S. 287, 293 (1945).

The importance of a determination by this Court of when a corporate taxpayer's existence may be deemed to be terminated for Federal tax purposes is apparent from the number of litigated cases in lower courts which have involved the question. Moreover, as stated above, the decision of the Court of Appeals is in direct conflict with the decisions in three of those cases and contrary to the reasoning of several others.

Conclusion

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

AMERICAN WELL AND PROSPECTING COMPANY

Petitioner,

by

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July 12, 1956.

APPENDIX

Statutes and Regulations Involved

Internal Revenue Code of 1939, 53 Stat., Part 1:

Sec. 710. Imposition of Tax.

. . .

(b) *Definition of Adjusted Excess Profits Net Income.*—As used in this section, the term "adjusted excess profits net income" in the case of any taxable year means the excess profits net income (as defined in section 711) minus the sum of:

(1) *Specific Exemption* . . .

(2) *Excess Profits Credit* . . . ; and

(3) *Unused Excess Profits Credit.*—The amount of the unused excess profits credit adjustment for the taxable year, computed in accordance with subsection (c).

(c) *Unused Excess Profits Credit Adjustment.*—

(1) *Computation of Unused Excess Profits Credit Adjustment.*—The unused excess profits credit adjustment for any taxable year shall be the aggregate of the unused excess profits credit carry-overs and unused excess profits credit carry-backs to such taxable year.

(2) *Definition of Unused Excess Profits Credit.*—The term "unused excess profits credit" means the excess, if any, of the excess profits credit for any taxable year beginning after December 31, 1939, over the excess profits net income for such taxable year, computed on the basis of the excess profits credit applicable to such taxable year. For such purpose the excess profits credit and the excess profits net income for any taxable year beginning in 1940 shall be computed under the law applicable to taxable years beginning in 1941. The unused excess profits credit for a taxable year of less than twelve months shall be an amount which is such part of the unused excess profits credit determined under the first sentence of this paragraph as the number of days in

the taxable year is of the number of days in the twelve months ending with the close of the taxable year. There shall be no unused excess profits credit for a taxable year beginning after December 31, 1946. . . .

(3) *Amount of Unused Excess Profits Credit Carry-Back and Carry-Over.*—

(A) *Unused Excess Profits Credit Carry-Back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has an unused excess profits credit, such unused excess profits credit shall be an unused excess profits credit carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such unused excess profits credit over the adjusted excess profits net income for the second preceding taxable year computed for such taxable year (i) by determining the unused excess profits credit adjustment without regard to such unused excess profits credit, and (ii) without the deduction of the specific exemption provided in subsection (b) (1).

. . .

SEC. 712. EXCESS PROFITS CREDIT—ALLOWANCE.

(a) *Domestic Corporations.*—In the case of a domestic corporation which was in existence before January 1, 1940, the excess profits credit for any taxable year shall be an amount computed under section 713 or section 714, whichever amount results in the lesser tax under this subchapter for the taxable year for which the tax under this subchapter is being computed. In the case of all other domestic corporations the excess profits credit for any taxable year shall be an amount computed under section 714. For allowance of excess profits credit in case of certain reorganizations of corporations, see section 741.

Treasury Regulations 111:

Sec. 29.52-1. *Corporation returns.*— . . . A corporation having an existence during any portion of a taxable year is required to make a return. If a corporation was

not in existence throughout an annual accounting period (either calendar year or fiscal year), the corporation is required to make a return for that fractional part of a year during which it was in existence. A corporation is not in existence after it ceases business and dissolves, retaining no assets, whether or not under State law it may thereafter be treated as continuing as a corporation for certain limited purposes connected with winding up its affairs, such as for the purpose of suing and being sued. If the corporation has valuable claims for which it will bring suit during this period, it has retained assets, and it continues in existence. A corporation does not go out of existence if it is merely turned over to receivers or trustees who continue to operate it. A corporation which has received a charter, but has never perfected its organization, which has transacted no business and had no income from any source, may upon presentation of the facts to the collector be relieved from the necessity of making a return as long as it remains in an unorganized condition. In the absence of a proper showing to the collector such a corporation will be required to make a return. . . .

Treasury Regulations 112:

Sec. 35.710-3. *Unused excess profits credit adjustment.*—(a) *Unused excess profits credit.*—The unused excess profits credit for any taxable year beginning after December 31, 1939, is the excess of the excess profits credit for the taxable year over the excess profits net income, if any, for such taxable year. . . .

. . .

A corporation may have an unused excess profits credit for a taxable year beginning in 1946, which may be carried back to the two preceding taxable years, even though no excess profits tax is imposed for such taxable year. The unused excess profits credit for a taxable year beginning in 1946 is to be computed in the same manner as though an excess profits tax were imposed for such taxable year. . . . There will be no unused excess profits credit for a taxable year beginning after December 31, 1946.

EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 11,588

AMERICAN WELL AND PROSPECTING COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

APPEAL FROM THE TAX COURT OF THE UNITED STATES

Argued October 7, 1955

Before BIGGS, *Chief Judge*, and MARIS and GOODRICH, *Circuit Judges*

OPINION OF THE COURT

(Filed March 22, 1956)

By BIGGS, *Chief Judge.*

The taxpayer, American Well and Prospecting Company, is a Texas corporation organized in 1931. It was engaged in manufacturing and selling oil well rotary drilling equipment and accessories and in the making of armaments for the United States for a number of years prior to 1946. Bethlehem Steel Corporation acquired all of the outstanding capital stock of the taxpayer in 1944 and still holds it.

On December 19, 1945, the taxpayer entered into a contract with Bethlehem Supply Company (Supply), then and now another wholly owned subsidiary of Bethlehem Steel

Corporation. Supply agreed to assume, pay and perform all of the liabilities and obligations of the taxpayer as of the opening of business on January 1, 1946, and also agreed to perform for the taxpayer all of its obligations with respect to certain contracts and leases relating to the machinery and equipment owned by the United States government. It was further agreed that, if taxpayer purchased any such equipment subsequently, it would resell the equipment to Supply at cost, unless its agreement with the United States prohibited such a course. The taxpayer agreed that it would sell to Supply all of its transferable assets, save its corporate records and franchise. Certain physical equipment owned by the United States was, of course, excluded.

The contract also provided that, as soon as possible after the closing date, Supply would pay to the taxpayer for the properties to be sold an amount equal to the aggregate net book value of the property less the aggregate book value of the liabilities and obligations of the taxpayer assumed by Supply. The taxpayer also agreed that if any of the rights or interests or any of the obligations under any of its contracts could not be assigned to Supply, the taxpayer would seek to obtain the necessary consents to permit such assignments. Under the terms of the contract the taxpayer was required to cooperate with Supply, if the necessary consents could not be obtained, to the end that the obligations of the taxpayer should "be performed in such manner that the value and benefits of the contract in question shall be preserved and shall inure directly or indirectly to the benefit of the Supply Company."

On January 2, 1946, instruments of conveyance dated December 31, 1945, were delivered by the taxpayer to Supply; and Supply assumed all liabilities and obligations of the taxpayer as of the opening of business on January 1, 1946. Among the assets owned by the taxpayer and covered by the agreement were claims against the United States. Most of these were settled in 1946. The taxpayer also had certain clean-up jobs which it was obligated to

perform for the United States. In connection with these, the taxpayer purchased from the United States material and machinery owned by the government and located on the property formerly owned by the taxpayer and sold by it to Supply pursuant to the contract. The amounts necessary to effect these purchases were furnished by Supply, and Supply received the proceeds of the sale of the material and machinery. In October 1951 the taxpayer settled a claim asserted against it by the United States in the sum of $1,300 for defective material delivered prior to January 1, 1946.

Negotiations for these settlements and the purchase of machinery and supplies, hereinbefore referred to, were conducted by persons who were officers of the taxpayer but were also officers of Supply, Bethlehem Steel Company and Bethlehem Steel Corporation. These officers did not receive any compensation from the taxpayer during 1946 and 1947 but were compensated by one or more of the other companies referred to. No entries of receipts or disbursements were made on any of the taxpayer's books in connection with the settlement or the purchases and sales referred to during the year 1946. All receipts or payments in respect thereto were received or made by Supply. A former employee of the taxpayer commenced an action in June 1946 for alleged unpaid compensation in the sum of $219,000. The taxpayer filed an answer and took other action until November 1, 1948, when the suit was dismissed following the death of the plaintiff. The expenses of the litigation were borne partly by Supply and partly by the former stockholders of the taxpayer from whom Bethlehem Steel Company had purchased the taxpayer's stock.

The net proceeds of the sale of the taxpayer's properties and assets amounted to $894,929. This amount was credited to the taxpayer in the intercompany bank account maintained by subsidiary companies of Bethlehem Steel Corporation. No formal action to dissolve the taxpayer was ever taken. In both 1946 and 1947 there were meetings

of stockholders and of the board of directors for the purpose of electing directors and officers. The balance sheets of the taxpayer as of the close of business on January 2, 1946, December 31, 1946, and December 31, 1947 were identical. The substance of these balance sheets is set out below.[1]

In 1948 the taxpayer acquired four sections of a drydock for $800,000, and in 1949 the taxpayer purchased another section. These drydock facilities represented an investment of approximately $1,500,000 at the time of the hearing before the Tax Court. The taxpayer made a business of renting the drydock.

The taxpayer did not have any excess profits net income for the taxable year 1946. It is agreed, however, that if the taxpayer is entitled to any unused excess profits credit for the year, the amount would be $74,909.27.

The Commissioner determined a deficiency in excess profits tax for the calendar year 1944 because of the disallowance of the unused excess profits credit carry-back from 1946. The Tax Court agreed with the Commissioner's determination, reasoning as follows: "The petitioner, at the beginning of 1946, disposed of the assets essential to the continued operation of the business which it had conducted with those or similar assets in 1944. Those assets were used during 1946 by Supply to carry on the business theretofore conducted by the petitioner. The results of the operation of that business during 1946 had no effect upon the petitioner but there might have been no excess profits credit to carry back to 1944 had the petitioner continued to conduct the business during 1946. Where the business was

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1

Assets

Accounts Receivable (intercompany bank account)	$894,929.00

Capital

Capital Stock	100,000.00
Paid-in Surplus	46,513.56
Earned Surplus	748,415.44
	$894,929.00

thus transferred to another and no longer operated by the petitioner, the latter was not intended by Congress to have the excess profits credit, wholly unnecessary for 1946, carried back to offset income of a year when the petitioner had operated the business . . . [citing cases]. It makes no difference that after several years the petitioner began to engage in a new and unrelated business." 23 T.C. 503, 507 (1954). The petition for review followed.

Section 710(c)(3)(A) of the Internal Revenue Code of 1939 governs. It provides: "If for any taxable year beginning after December 31, 1941, the taxpayer has an unused excess profits credit, such unused excess profits credit shall be an unused excess profits credit carry-back for each of the two preceding taxable years. . . ." Section 710(c)(2) states: "The term 'unused excess profits credit' means the excess, if any, of the excess profits credit for any taxable year beginning after December 31, 1939, over the excess profits net income for such taxable year, computed on the basis of the excess profits credit applicable to such taxable year. . . . There shall be no unused excess profits credit for a taxable year beginning after December 31, 1946. The unused excess profits credit for a taxable year beginning in 1946 and ending in 1947 . . . [shall be prorated to January 1, 1947]." The taxpayer's taxable year 1946 was a calendar year.

From the face of the statute, it would appear that, if the taxpayer existed as a corporation for the entire year 1946, the carry-back is mandatory. Nonetheless, the courts have held that the mere retention of a corporate shell, without internal business substance, does not entitle a corporate taxpayer to an excess profits carry-back [2] or to spread the profits of a partial year of business over the entire year, including dormant months, to reduce its excess profits tax or

2 ABC Brewing Corp. v. Commissioner, 224 F. 2d 483 (9 Cir. 1955); Wier Long Leaf Lumber Co. v. Commissioner, 173 F. 2d 549 (5 Cir. 1949) (as to the tax year 1944); Wheeler Insulated Wire Co., 22 T.C. 380 (1954); Winter & Co., 13 T.C. 108 (1949); Gorman Lumber Sales Co., 12 T.C. 1184 (1949); Rite-Way Products, Inc., 12 T.C. 475 (1949).

to create a carry-back.[3] This is the *de facto* dissolution doctrine. With few exceptions, however, the cases in which courts have applied this doctrine concerned corporations which were totally or almost completely liquidated.[4] In the case at bar, taxpayer has never been liquidated but is in fact now actively engaged in a different type of business enterprise.

Let us lay aside for the moment this factual distinction and determine whether the taxpayer would have been held to have been *de facto* dissolved in 1946 had it eventually been liquidated without acquiring any additional operating assets. For if the taxpayer would not have been held to have been *de facto* dissolved, it will be unnecessary to consider the effect of the taxpayer's subsequent drydock operations on its tax year 1946.

The test of *de facto* corporate existence is well described in Westover Co. v. Smyth, 99 F. Supp. 488 (N.D. Calif. 1951), 51-2 USTC ¶ 66,019 at page 84,075,[5] as follows: ". . . not the size of the activities but their nature and purpose; not whether some other form of business organization might have sufficed but whether the form chosen was bona fide; not whether the corporation might have dissolved earlier, but whether during the period for which it is claiming the carry-back it has engaged in corporate activities so that its existence may not be disregarded." The fact that there was no liquidating dividend in the case at bar does not preclude a finding of *de facto* dissolution. The courts have had no difficulty in holding corporations to be *de facto* dissolved when funds still remained to be distributed to stockholders.[6] Here a few entries on the Bethlehem intercompany ledgers would have reduced the taxpayer's status to a row of ciphers. Furthermore, all of the taxpayer's ac-

3 Eastern Grain Elevator Corp. v. McGowan, 95 F. Supp. 40 (W.D. N.Y. 1950); Diamond A Cattle Co., 21 T.C. 1 (1953); Winter & Co., note 2 *supra*.

4 Cases cited in notes 2 and 3 *supra*, except Wheeler and Winter.

5 The opinion of the court does not appear at 99 F. Supp. 488, but only the trial judge's findings of facts and conclusions of law and the judgment.

6 See cases cited in notes 2 and 3 *supra*, except Eastern Grain Elevator.

tivities after January 2, 1946 relating to its original enterprise were conducted merely as agent for Supply. The taxpayer incurred no costs in winding up its old business; Supply paid all the bills, including the salaries of the taxpayer's officers. The taxpayer acquired no additional income during the winding up; Supply was entitled to such income under its contract.[7] For over two years the taxpayer's balance sheet remained exactly the same as it was on January 2, 1946. In sum, the taxpayer existed only as a name through which Supply completed its acquisition of the taxpayer's former assets, and as a page in the Bethlehem intercompany ledger. There is no decision holding a corporate taxpayer entitled to an excess profits credit on such facts; there are several decisions holding corporations with considerably more business activity, whose balance sheets were affected, not entitled to the credit.[8] Thus, unless the entry into the drydock business in 1948 changes the result, the taxpayer in the case at bar would not be entitled to an excess profits credit for the tax year 1946.

The Commissioner long contended that a corporate taxpayer which changed the nature of its business was not entitled to carry back an unused excess profits credit acquired under its new enterprise to offset excess profits taxes incurred under the old enterprise. The courts uniformly

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7 In many respects, the transfer of all of the taxpayer's assets and liabilities to Supply resembled a merger. And when one corporation merges into another, its existence ceases for all excess profits tax calculation purposes. Pepsi Cola Co. v. Commissioner, 155 F. 2d 921 (2 Cir. 1946).

8 ABC Brewing Corp. v. Commissioner; Wier Long Leaf Lumber Co. v. Commissioner, both note 2 *supra*; Eastern Grain Elevator Corp. v. McGowan, note 3 *supra*; Gorman Lumber Sales Co.; Rite-Way Products, Inc., both note 2 *supra*.

Cases where courts have found sufficient business activity to entitle corporations in liquidation to excess profits credits include: Commissioner v. Allegheny Broadcasting Corp., 179 F. 2d 844 (3 Cir. 1950); Wier Long Leaf Lumber Co. v. Commissioner, note 2 *supra* (as to the tax year 1943); Brainard v. Scofield, 54-1 USTC ¶ 66,066 (W.D. Tex. 1953); Myers v. United States, 52-1 USTC ¶ 66,031 (E.D. Ark. 1952); Justice Motor Corp. v. McGowan, 97 F. Supp. 570 (W.D. N.Y. 1951); Bowman v. Glenn, 84 F. Supp. 200 (W.D. Ky. 1949), aff'd *p.c.*, 184 F. 2d 670 (6 Cir. 1950); Roeser & Pendleton, Inc., 15 T.C. 966 (1950). See also United States v. Kingman, 170 F. 2d 408 (5 Cir. 1948); Union Bus Terminal, Inc., 12 T.C. 197 (1949), aff'd *p.c.*, 179 F. 2d 399 (5 Cir. 1950).

disapproved the Commissioner's contention.[9] In those cases, however, the courts stressed the continuity of the corporate taxpayer's business activity, even though the nature of the activity changed.[10] During the years for which excess profits credits were allowed, the taxpayers involved were much more than corporate shells kept alive only for purposes of tax evasion.

In the case at bar a gap of over two years occurred between the date the taxpayer disposed of those assets necessary to carry on its old business and the acquisition of the drydock sections in 1948. During the intervening period, the taxpayer served occasionally as a funnel for Supply, which had acquired all of the taxpayer's assets and liabilities, to dispose of claims arising out of the taxpayer's former operations. The hollow quality of the taxpayer's corporate existence during this period is borne out by its balance sheets, which were identical as of the close of business on January 2, 1946, December 31, 1946, and December 31, 1947. It thus appears that after January 2, 1946, the taxpayer was little more than another corporate charter lodged in the files of the Bethlehem Steel family of corporations to await the moment when Bethlehem saw fit to breathe life into it to serve some new business purpose. In such a situation, can the drydock operations undertaken in 1948 close the hiatus of corporate inactivity during 1946, 1947, and part of 1948?

There is no case directly in point. There are, however, two Tax Court decisions involving taxpayers whose charters were similarly lodged in corporate family files. See Wheeler Insulated Wire Co., 22 T.C. 380 (1954) and Winter & Co., 13 T.C. 108 (1949). In the Wheeler case, the Sperry

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9 Mesaba-Cliffs Min. Co. v. Commisioner, 174 F. 2d 857 (6 Cir. 1949); Westover Co. v. Smyth, 99 F. Supp. 488 (N.D. Calif. 1951); Jos. Capps, Inc. v. United States, 86 F. Supp. 712 (S.D. Calif. 1949); Whitney Manufacturing Co., 14 T.C. 1217 (1950); Alprosa Watch Corp., 11 T.C. 240 (1948). Compare Aluminum Products Co. v. United States, 101 F. Supp. 373 (Ct. Cl. 1951).

10 See, *e.g.*, Westover Co. v. Smyth, note 9 *supra*, 51-2 USTC ¶ 66,019 at page 84,074; Jos. Capps, Inc. v. United States, note 9 *supra*, 86 F. Supp. at 713; Whitney Manufacturing Co., note 9 *supra*, 14 T.C. at 1221.

Corp. transferred the assets of a prosperous subsidiary, Connecticut, to another subsidiary, Wheeler, so that Wheeler's excess profits credits could be used to offset Connecticut's profits. Connecticut then attempted, unsuccessfully, to claim for its own benefit an unused excess profits credit carry-back from its assetless years to its last year of active business. It does not appear from the record in the instant case whether Supply's acquisition of the taxpayer's business assets resulted in a similar tax advantage to Supply, although we are told that the taxpayer was operating at a loss at the time of the transfer of its assets and it is probable that Supply was operating at a profit. In any event, there could be only two reasons for keeping a corporation alive under the circumstances of the case at bar in 1946: to avoid taxes, or to have a spare corporate charter conveniently ready for use whenever desired by the parent corporation. Neither is a sufficient business purpose of the taxpayer to negate the Tax Court's finding that the taxpayer in the case at bar was not entitled to an unused excess profits credit carry-back from the tax year 1946.

The decision of the Tax Court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

EXHIBIT B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,588

AMERICAN WELL AND PROSPECTING COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES

Present: BIGGS, *Chief Judge,* and MARIS and GOODRICH, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk

March 22, 1956

RECEIVED & FILED
MAR. 22, 1956

IDA O. CRESKOFF,
Clerk

EXHIBIT C

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 11,588

AMERICAN WELL AND PROSPECTING COMPANY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

SUR PETITION FOR REHEARING

Present: BIGGS, *Chief Judge,* and MARIS and GOODRICH, *Circuit Judges.*

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

RECEIVED & FILED
APR. 18, 1956

IDA O. CRESKOFF,
Clerk

By the Court

BIGGS
Chief Judge

Dated: April 18, 1956

No. 258

FILED
JUL 1 7 1955
JOHN T. FEY, Clerk

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 11,588

AMERICAN WELL AND PROSPECTING COMPANY,

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

[redacted] APPENDIX FOR PETITIONER

CRAVATH, SWAINE & MOORE,
Attorneys for Petitioner,
15 Broad Street,
New York 5, N. Y.

HOYT A. MOORE
GEORGE G. TYLER
ALBERT ROSENBLUM
Of Counsel.

RECEIVED & FILED
MAY 5 1955
IDA U. SHERROFF
Clerk

May 4, 1955

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APPENDIX

DOCKET No. 42958

AMERICAN WELL AND PROSPECTING COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

APPEARANCES:

For Petitioner: HOYT A. MOORE, Esq.
GEORGE G. TYLER, Esq.
RICHARD L. MUSGRAVE, Esq.

For Respondent: JOHN J. HOPKINS, Esq.

10/19/54—Assigned to Judge Murdock, Div. 3.

Docket Entries

1952

July 28—Petition received and filed. Taxpayer notified. Fee paid.

" 31—Copy of petition served on General Counsel.

" 28—Request for Circuit hearing in New York, N. Y. filed by taxpayer. 8/6/52—Granted.

Sept. 12—Answer filed by General Counsel.

" 24—Copy of answer served on taxpayer, New York, N. Y.

1954

Jan. 21—Hearing set April 19, 1954, New York, N. Y.

Apr. 19—Hearing had before Judge Baar on the merits. Stipulation of Facts filed. Briefs due 6/1/54: Replies due 6/21/54.

May 17—Transcript of Hearing 4/19/54 filed.

" 28—Motion for extension to June 10, 1954 to file brief, filed by taxpayer. 5/28/54—Granted.

Docket Entries

1954

June 9—Brief filed by General Counsel. 6/10/54—Copy served.

" 10—Brief filed by taxpayer. 6/10/54—Copy served.

" 24—Reply Brief filed by taxpayer.

Dec. 21—Opinion filed, Judge Murdock, Decision will be entered for the respondent. Copy served.

" 29—Decison entered. Judge Murdock, Div. 3.

1955

Mar. 2—Petition for Review by U. S. Court of Appeals for the Third Circuit filed by taxpayer.

" 2—Proof of Service filed.

" 2—Designation of Contents of Record with acknowledgment of service thereon filed by petitioner.

Opinion of The Tax Court of the United States Filed December 21, 1954

23 T. C. No. 61

THE TAX COURT OF THE UNITED STATES

AMERICAN WELL AND PROSPECTING COMPANY, Petitioner, v. COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket No. 42958.

Filed December 21, 1954.

EXCESS PROFITS TAX—CREDIT CARRY-BACK—DISCONTINUANCE BY SALE—SECTION 710(c) (3).—A corporation, on January 1, 1946, sold all of its assets to a related corporation which assumed all of the seller's obligations and liabilities. The seller ceased to operate a business but remained in existence to cooperate with the purchaser so that the latter might derive the benefit of certain contracts and claims that were unassignable. The seller after two years again engaged in business activities, but they were unrelated to its original enterprise.

Held, the selling corporation was not entitled to an unused excess profits credit carry-back from 1946 to 1944.

George G. Tyler, Esq., for the petitioner.

John J. Hopkins, Esq., for the respondent.

MURDOCK, *Judge:* The Commissioner determined a deficiency of $64,047.43 in excess profits tax for the calendar year 1944. It arose from the disallowance of an unused excess profits credit carry-back from 1946.

Opinion of The Tax Court of the United States Filed December 21, 1954

All of the facts have been stipulated.

The petitioner, which was organized on May 13, 1931, and is a Texas corporation, filed its tax returns for the years 1944, 1945 and 1946 with the collector of internal revenue for the twelfth district of Pennsylvania.

The petitioner was engaged in the business of manufacturing and selling oil well rotary drilling equipment and accessories and of manufacturing armaments for the United States Government for a number of years prior to 1946. Bethlehem Steel Company, at all times material hereto a wholly owned subsidiary of Bethlehem Steel Corporation, acquired all of the outstanding stock of the petitioner in 1944 and has since continued to own that stock. The petitioner entered into a contract on December 19, 1945 with Bethlehem Supply Company, hereinafter referred to as Supply, which was then and still is a wholly owned subsidiary of Bethlehem Steel Corporation, for the sale of all of its transferable assets and the assumption of all of its transferable obligations and liabilities as of the opening of business on January 1, 1946.

The petitioner agreed to sell to Supply all of its real property, machinery, equipment, raw materials, goods in process or completed, contracts and leases, patents, trademarks and trade names, cash and receivables and all other property except certain unassignable rights and interests. The contract of sale also excluded the petitioner's corporate records and franchise and certain equipment physically located in its plant but owned by the United States Government or agencies thereof. Supply agreed to assume, pay, perform or discharge all of the liabilities and obligations of the petitioner as of the opening of business on January 1,

1946, and further agreed to perform for the account of the petitioner all obligations of the petitioner with respect to certain contracts and leases relating to machinery and equipment owned by the United States Government and located at the petitioner's plant. It was further agreed that if the petitioner subsequently purchased any such equipment it would, unless prohibited by its agreement with the Government, resell the same to Supply at cost.

The contract further provided that as soon after the closing date as conveniently possible Supply would pay to the petitioner for the properties to be sold an amount which would be the aggregate net book value of such properties less the aggregate book value of all the liabilities and obligations of the petitioner assumed by Supply. The petitioner also agreed that in the event any of the rights or interests or any of the obligations under any of its contracts were not assignable to Supply, it would seek to obtain any consents necessary to permit such assignments. The petitioner was required to cooperate with Supply, if such consents could not be obtained, to the end that the obligations of the petitioner should "be performed in such manner that the value and benefits of the contract in question shall be preserved and shall inure directly or indirectly to the benefit of the Supply Company."

The contract was closed on January 2, 1946, by the delivery of instruments of conveyance dated December 31, 1945, and by assumption by Supply of all liabilities and obligations of the petitioner as of the opening of business on January 1, 1946.

Among the assets owned by the petitioner and which were covered by the agreement were the following:

Claims against the United States Government for payments in connection with the termination of a war contract which was settled in May 1946, after correspondence and negotiations, for approximately	$270,000.00
Claim against the United States Government for overpayment of rentals which was settled in August 1946 for approximately	$ 3,300.00
Claim against the United States Government for a refund of petitioner's 1943 excess profits tax, which claim had not been collected at the time of the hearing herein and which amounted to ...	$ 25,526.36

The petitioner had correspondence in 1946 and 1947 with various United States Government departments with respect to clean-up work which it was obligated to do under the terms of contracts executed in prior years. The petitioner purchased from the United States, in connection with this work, certain material and machinery owned by the Government but located on the property formerly owned by the petitioner. The amounts necessary for such purchases were furnished by Supply and the proceeds of the sales of such material and machinery were realized by Supply. The petitioner, in October 1951, settled for approximately $1,300 a claim asserted against it by the United States Government for defective material delivered prior to January 1, 1946. The settlement negotiations with respect to the foregoing claims and the purchases and sales of the machinery and other material were conducted by

persons who were officers of the petitioner and also officers of Supply, Bethlehem Steel Company and Bethlehem Steel Corporation. These persons did not receive any compensation from the petitioner during 1946 and 1947 and were compensated by one or more of the other companies.

No entries of receipts or of disbursements were made on the petitioner's books in connection with the settlement of the foregoing claims or in connection with the purchases and sales during the years 1946 and 1947 and all receipts or payments with respect thereto were or will be realized or made by Supply. A former employee of the petitioner commenced an action in June 1946 for alleged unpaid compensation in the amount of $219,000. The petitioner filed an answer and took other action in that suit until November 1, 1948, when it was dismissed following the death of the plaintiff. The expenses of the litigation were borne partly by Supply and partly by former stockholders of the petitioner from whom the Bethlehem Steel Company had purchased the petitioner's stock.

The net proceeds of the sale of the petitioner's properties and assets amounted to $894,929 and this amount was credited to the petitioner in the intercompany bank account maintained by subsidiary companies of Bethlehem Steel Corporation. No formal action to dissolve the petitioner was ever taken by its board of directors or sole stockholder and annual meetings of both were held during 1946 and 1947 for the purpose of electing directors and officers. The balance sheets of the petitioner at the close of business on January 2, 1946, at December 31, 1946, and at December 31, 1947 were identical and were as follows:

Opinion of The Tax Court of the United States Filed December 21, 1954

Assets	
Accounts Receivable (intercompany bank account)	$894,929.00
Capital	
Capital Stock	$100,000.00
Paid-in Surplus	46,513.56
Earned Surplus	748,415.44
	$894,929.00

The petitioner acquired four sections of a dry dock in 1948 for approximately $800,000 and in 1949 purchased another section. The petitioner's dry dock facilities represented an investment of approximately $1,500,000 at the time of the hearing, and it was in the business of renting the dry dock.

The parties have stipulated that the petitioner did not have any excess profits net income for the taxable year 1946 and if the petitioner is entitled to any unused excess profits credit the amount would be $74,909.27.

The petitioner argues that it is entitled to carry back the unused excess profits credit from 1946 since no action to dissolve it had ever been taken, no liquidation distribution had ever been made, and because it was in fact still in existence and engaged in business at the time of the hearing. The petitioner further argues that its continued existence was required by the contract of sale of December 19, 1945, since it was under an obligation to cooperate with Supply in connection with the completion of the unassignable contracts and the prosecution and collection of the unassignable claims.

Opinion of The Tax Court of the United States Filed December 21, 1954

Existing law, at the time the Revenue Bill of 1942 was under consideration, permitted corporations to carry forward for two years net operating losses and unused excess profits credits. Congress recognized that such provisions were of benefit only in periods of increasing business activities and would not alleviate the suffering of corporations in periods of declining profits, especially at the close of a war economy. It was anticipated that wartime shortages and controls would greatly upset the normal cycle of the matching of taxable income against deductible expenses and that many expenses, such as those for maintenance and repairs, would be deferred to postwar years when they would not be available to offset wartime earnings. This postponement of deductible expenses to years in which the excess profits tax was not in effect would have imposed a great tax burden on corporations. The two-year carry-back provision was adopted to afford relief in such hardship cases. S. Rept. No. 1631, 77th Cong., 2d Sess., pp. 51-52 (1942-2 C. B. 504, 546-547). It was retained for a year beyond the repeal of the excess profits tax itself in order to be sure that business had an opportunity to apply reconversion expenditures to reduce wartime taxes. S. Rept. No. 655, 79th Cong., 1st Sess., p. 19 (1945 C. B. 621, 636). Section 122(c) of the Revenue Act of 1945 allowed corporate taxpayers to carry back to 1944 and 1945 any unused excess profits credit for 1946 as defined in section 710(c) of the Internal Revenue Code of 1939.

The petitioner, at the beginning of 1946, disposed of the assets essential to the continued operation of the business which it had conducted with those or similar assets in

1944. Those assets were used during 1946 by Supply to carry on the business theretofore conducted by the petitioner. The results of the operation of that business during 1946 had no effect upon the petitioner but there might have been no excess profits credit to carry back to 1944 had the petitioner continued to conduct the business during 1946. Where the business was thus transferred to another and no longer operated by the petitioner, the latter was not intended by Congress to have the excess profits credit, wholly unnecessary for 1946, carried back to offset income of a year when the petitioner had operated the business. *Winter and Company, Inc.*, 13 T. C. 108, appeal dismissed (C. A. 7, 1951); *Diamond A Cattle Company*, 21 T. C. 1; *Wheeler Insulated Wire Company, Inc.*, 22 T. C. 380. Cf. *Wier Long Leaf Lumber Co.*, 173 F. 2d 549, affirming in part and reversing in part 9 T. C. 990. It makes no difference that after several years the petitioner began to engage in a new and unrelated business.

Decision will be entered for the respondent.

Decision of The Tax Court of the United States Entered December 29, 1954

THE TAX COURT OF THE UNITED STATES

WASHINGTON

Docket No. 42958

AMERICAN WELL AND PROSPECTING COMPANY,
Petitioner.

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Pursuant to the determination of the Court, as set forth in its Opinion, filed December 21, 1954,
it is

ORDERED AND DECIDED: That there is a deficiency in excess profits tax of $64,047.43 for the calendar year 1944.

Entered: Dec. 29, 1954

(Signed) J. E. MURDOCK
Judge.

Stipulation of Facts

THE TAX COURT OF THE UNITED STATES

Docket No. 42958

AMERICAN WELL AND PROSPECTING COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

IT IS HEREBY STIPULATED that, for the purposes of this proceeding, the following statements shall be accepted as facts without prejudice to the right of either party to introduce other and further evidence not inconsistent therewith:

1. The petitioner, which was organized on May 13, 1931, is a corporation organized and existing under the laws of the State of Texas with its principal office at Corsicana, Texas, and its mailing address at 701 East Third Street, Bethlehem, Pennsylvania.

2. The petitioner filed its corporation income and declared value excess profits tax return and its corporation excess profits tax return for the taxable year 1944 with the Collector of Internal Revenue for the 12th Collection District of Pennsylvania at Scranton, Pennsylvania. Attached hereto are copies of said returns marked Exhibits 1-A and 2-B, respectively.

3. The petitioner filed its income and declared value excess profits tax return for the taxable year 1945 and its

income tax returns for the taxable years 1946 and 1947 with the Collector of Internal Revenue for the 12th Collection District of Pennsylvania at Scranton, Pennsylvania. Attached hereto are copies of said returns marked Exhibits 3-C, 4-D and 5-E, respectively.

4. A copy of the Commissioner's notice of deficiency dated June 6, 1952, addressed to the petitioner is attached as an Exhibit to the petition herein.

5. For a number of years prior to January 1, 1946, the petitioner was engaged in the business of manufacturing and selling oil well rotary drilling equipment and accesories and also in the manufacture of armaments for the United States Government.

6. In 1944, Bethlehem Steel Company, a Pennsylvania corporation, acquired all the outstanding stock of the petitioner and has continued to own such stock to the present time. All the outstanding stock of the aforesaid Bethlehem Steel Company was and still is owned by Bethlehem Steel Corporation, a Delaware corporation.

7. The Board of Directors of the petitioner, at a special meeting on December 17, 1945, approved an agreement whereby all the petitioner's assets, except those more specifically described in the agreement, were to be conveyed to, and all the petitioner's liabilities were to be assumed by, Bethlehem Supply Company, a Delaware corporation (hereinafter called the Supply Company), which was also engaged in the manufacture and sale of oil well equipment. The petitioner's stockholders, at a special meeting on December 18, 1945, also approved said agreement. Attached hereto are copies of the minutes of the aforesaid Board of Directors

meeting and stockholders meeting, marked Exhibits 6-F and 7-G respectively.

8. During the year 1945 and up to the present time, all the outstanding stock of the Supply Company was owned by the aforesaid Bethlehem Steel Corporation.

9. By an agreement dated December 19, 1945, a copy of which is attached hereto and marked Exhibit 8-H, the petitioner agreed to sell and transfer all its properties and assets, except those more specifically described in the agreement, as of the opening of business on January 1, 1946, to the Supply Company.

10. Pursuant to the terms of the aforesaid agreement, all such properties and assets of the petitioner which were transferable were transferred by the petitioner to the Supply Company by instruments dated December 31, 1945, and delivered on January 2, 1946, and all liabilities and obligations of the petitioner were assumed by the Supply Company as of the opening of business on January 1, 1946.

11. The net proceeds of the sale of the petitioner's properties and assets amounted to $894,929.00 and such amount was credited to the petitioner in the intercompany bank account maintained by Subsidiary Companies of Bethlehem Steel Corporation.

12. The balance sheet of the petitioner at the close of business on December 31, 1945, is as stated in the schedule attached hereto and marked Exhibit 9-I.

13. The balance sheets of the petitioner at the close of business on January 2, 1946, at December 31, 1946, and at December 31, 1947, were identical and are as follows:

Assets	
Accounts Receivable (inter-company bank account)	$894,929.00
Capital	
Capital Stock	$100,000.00
Paid in Surplus	46,513.56
Earned Surplus	748,415.44
	$894,929.00

14. No formal action to dissolve the petitioner was ever taken by the Board of Directors or the stockholders of the petitioner. Annual meetings of the stockholders of the petitioner were held on April 16, 1946, and April 15, 1947, and special meetings of the Board of Directors were held on April 22, 1946, April 28, 1947, and November 3, 1947. Copies of the minutes of said meetings are attached hereto and marked Exhibits 10-J, 11-K, 12-L, 13-M and 14-N, respectively. Copies of all minutes of the stockholders and directors of the petitioner for the period December 1, 1945, to December 31, 1947, are attached as Exhibits to this Stipulation.

15. Among the assets owned by the petitioner which were covered by said agreement between the petitioner and the Supply Company (Exhibit 8-H hereto) were claims of the petitioner against the United States Government. One of such claims of the petitioner against the United States Government was for payments in connection with the termination of a war contract between the United States and the petitioner which was settled in May, 1946, for

approximately $270,000 after correspondence and negotiations with the Government.

16. Another such claim against the United States Government was for overpayment of rentals which was settled in August, 1946, for approximately $3,300 after correspondence and negotiations with the Government.

17. Another such claim against the United States is for a refund of the petitioner's 1943 excess profits tax in the amount of $25,526.36, plus interest, which the petitioner has not yet collected and which arises from a carry back of an unused excess profits credit from the taxable year 1945 to the taxable year 1943.

18. A claim by the United States Government against the petitioner for defective material delivered prior to January 1, 1946, was settled by the petitioner in October, 1951, for approximately $1,300.

19. In the years 1946 and 1947, the petitioner had correspondence with various United States Government departments with respect to cleanup work which the petitioner was obligated to do under the terms of the contracts which it had entered into in prior years with the United States. In that connection, the petitioner purchased from the United States certain material and machinery owned by the United States but located upon the property formerly owned by the petitioner and used in connection with the performance of such contracts. The amounts necessary for such purchases were supplied by the Supply Company and the proceeds of sales of such material and machinery were realized by the Supply Company.

20. Settlement of the aforesaid claims and the purchases and sales of such material and machinery were negotiated by persons who were officers of the petitioner and also officers of the Supply Company, Bethlehem Steel Company and Bethlehem Steel Corporation, which persons did not receive any compensation from the petitioner during 1946 and 1947 and were compensated by one or more of the other companies.

21. All receipts or payments pursuant to the settlements of the aforesaid claims were or will be realized by or made by the Supply Company directly or indirectly. Entries of receipts or disbursements were not made on the petitioner's books in connection with the settlement of such claims or in connection with the aforesaid purchases and sales during the years 1946 and 1947.

22. In June, 1946, Carl Anderson, a former employee of the petitioner, commenced a suit against the petitioner in the District Court for the Thirteenth Judicial District of Texas for alleged unpaid compensation alleged to be owing to him from the petitioner in the amount of $219,000. The petitioner filed an answer and took other action in that suit from its inception to November 1, 1948, when, after the death of the plaintiff, the suit was dismissed. The litigation expenses in defending the suit were borne partly by the Supply Company and partly by the former stockholders of the petitioner from whom the aforesaid Bethlehem Steel Company purchased the stock of the petitioner.

23. In 1948, the petitioner acquired for approximately $800,000 four sections of a drydock located in Florida and subsequently moved them to Texas. In 1949, the petitioner

bought another section of drydock. Its drydock facilities presently represent an investment of approximately $1,500,000 and it is in the business of renting the drydock.

24. The petitioner did not have any excess profits net income for the taxable year 1946. If the petitioner is entitled to an excess profits credit for the taxable year 1946, such credit will be $74,909.27. If this Court shall determine that the petitioner is entitled to carry back an unused excess profits credit from the taxable year 1946 to the taxable year 1944, such carry back will result in an unused excess profits credit adjustment for the taxable year 1944 under Section 710(b)(3) of the Internal Revenue Code in the amount of $74,909.27.

/s/ GEORGE G. TYLER
Counsel for Petitioner

/s/ DANIEL A. TAYLOR FXG
Chief Counsel,
Internal Revenue Service,
Counsel for Respondent.

Agreement Dated December 19, 1945, between American Well and Prospecting Company and Bethlehem Supply Company (Exhibit 8-H to the Stipulation of Facts)

AGREEMENT dated the 19th day of December, 1945, between AMERICAN WELL AND PROSPECTING COMPANY, a Texas corporation (hereinafter called the American Company), party of the first part, and BETHLEHEM SUPPLY COMPANY, a Delaware corporation (hereinafter called the Supply Company), party of the second part.

WHEREAS the Board of Directors of the American Company and the holder of all of the issued and outstanding capital stock of the American Company have each determined, at meetings duly called and held, by resolutions duly adopted, that it is advisable and in the interest of the American Company that its business and all of its properties and assets (except as hereinafter provided) be acquired by, and (except as hereinafter provided) all its liabilities and obligations be taken over and assumed by, the Supply Company as of the opening of business on January 1, 1946; and

WHEREAS the Board of Directors of the Supply Company has determined at a meeting duly called and held, by resolution duly adopted, that it is advisable and in the interest of the Supply Company that it acquire the business and all of the properties and assets (except as aforesaid), and take over and assume (except as aforesaid) the liabilities and obligations, of the American Company as of the opening of business on January 1, 1946.

NOW, THEREFORE, THIS AGREEMENT WITNESSETH as follows:

Agreement Dated December 19, 1945, between American Well and Prospecting Company and Bethlehem Supply Company (Exhibit 8-H to the Stipulation of Facts)

FIRST. The American Company will sell, convey, assign and transfer to the Supply Company, by an indenture in form satisfactory to the Supply Company, all the real property and interests in real property that are owned by the American Company at the date hereof or shall be acquired by it prior to the time of closing the transaction covered by this Agreement (such time being hereinafter sometimes referred to as the Closing Date), including, without limitation of the foregoing, the interests in real property comprising, or used in connection with, the manufacturing plant of the American Company located in Corsicana, Navarro County, Texas.

SECOND. The American Company will as of the opening of business on January 1st, 1946, sell, assign and transfer to the Supply Company all the following described property, to wit:

(a) Except as hereinafter provided, all and singular the facilities used in or relating to the manufacturing and allied operations carried on by the American Company, including, without limitation of the foregoing, cranes, machines and machine tools, shafting, belting, drives, motors, furnaces, boilers, dies, patterns, tools, generators, transformers, switch gear, drawings, furniture, fixtures, implements, locomotives, engines, cars, wagons, automobiles, trucks, conveyances, and all other like personal property wheresoever situate at said time and owned by the American Company;

(b) All coal, coke, steel, iron, lumber, fuel, oil and other materials and supplies, all products whether pro-

Agreement Dated December 19, 1945, between American Well and Prospecting Company and Bethlehem Supply Company (Exhibit 8-H to the Stipulation of Facts)

duced, manufactured, or fabricated, or in the process of production, manufacture, or fabrication, and all other tangible personal property, goods and chattels of every kind, name and nature (except the personal property referred to in the foregoing clause (a) of this Article Second) wheresoever situate at said time and owned by the American Company;

(c) All rights and interests of the American Company in, to and under all contracts between it and any other party or parties including any and all other contracts which have been acquired by the American Company by assignment or in any other manner or made by or for or on behalf of the American Company, except the rights and interests of the American Company under contracts and leases which pursuant to the specific terms thereof or any applicable provisions of law are unassignable;

(d) All letters patent granted or issued by the United States of America or any other country or government and all applications for any letters patent which are owned by the American Company and all rights and interests of the American Company in, to and under any letters patent so granted or issued and applications for letters patent and in, to and under any and all licenses to manufacture, use or sell any and all improvements, inventions or processes covered by any letters patent or applications therefor, together with the right to sue for and recover damages or profits for any infringement of any of said letters patent prior to the date hereof;

Agreement Dated December 19, 1945, between American Well and Prospecting Company and Bethlehem Supply Company (Exhibit 8-H to the Stipulation of Facts)

(e) All trade marks or trade names owned by the American Company, whether registered in, or otherwise protected by the laws of, the United States of America or any state, territory or dependency thereof or any foreign country or government, and all rights of the American Company in respect of any trade marks or trade names so registered or protected;

(f) All cash on hand and in banks, accounts receivable, notes receivable, prepaid charges, bonds, stocks and other securities of other corporations, claims, demands, equities and choses in action at present accrued or which shall hereafter accrue to the American Company; and

(g) All other property and assets, tangible and intangible, of every name and nature owned by the American Company or to which it may now or hereafter be entitled, except (i) the property referred to in Article First hereof, (ii) the unassignable rights and interests, if any, referred to in the preceding clause (c) hereof and (iii) the corporate records of the American Company and its franchise to be a corporation.

Anything herein to the contrary notwithstanding, the American Company does not hereby agree to sell or convey to the Supply Company, and this Agreement does not provide for the sale of, any of the machines, machine tools or other manufacturing equipment or facilities that are located at the above-mentioned plant at Corsicana, Texas, but are owned by the United States of America or agencies or departments thereof.

Agreement Dated December 19, 1945, between American Well and Prospecting Company and Bethlehem Supply Company (Exhibit 8-H to the Stipulation of Facts)

All the properties, rights and assets of the American Company which it hereby agrees to sell, convey, assign and/or transfer to the Supply Company as aforesaid are hereinafter sometimes collectively referred to as the properties to be sold.

THIRD. The Supply Company shall, and hereby agrees to, assume and pay, discharge or perform, as the case may be, all the liabilities and obligations of the American Company as of the opening of business on January 1, 1946. The Supply Company shall perform, for the account of the American Company, all obligations of the American Company yet to be performed under all contracts and leases of the American Company, whether now existing or hereafter entered into, relating to all or any of the above-mentioned machines, machine tools or other manufacturing equipment or facilities owned by the United States of America and located at the above-mentioned plant at Corsicana, Texas. If the American Company shall at any time hereafter purchase any of such machines, machine tools or other manufacturing equipment or facilities, it shall, unless prohibited from so doing by any agreement between it and the United States of America, resell the same to the Supply Company at the cost thereof to it.

FOURTH. The transaction covered by this Agreement shall be closed at No. 701 East Third Street, in the City of Bethlehem, Pennsylvania, at the opening of business on the 2nd day of January, 1946, at which time and place the American Company will deliver or cause to be delivered to the Supply Company instruments of conveyance, assignment

Agreement Dated December 19, 1945, between American Well and Prospecting Company and Bethlehem Supply Company (Exhibit 8-H to the Stipulation of Facts)

and transfer sufficient, in the opinion of counsel for the Supply Company, to transfer and convey to, and vest in, the Supply Company title to and ownership of all the properties to be sold.

FIFTH. As soon after the Closing Date as conveniently possible the Supply Company shall pay to the American Company for the properties to be sold an amount which shall be the aggregate net book value of the properties to be sold less the aggregate book value of all the liabilities and obligations of the American Company assumed by the Supply Company.

SIXTH. In case it should be found that any rights or interests under any contract of the American Company are not assignable, or any of the obligations of the American Company under any such contract are likewise not assignable, to the Supply Company, the American Company will endeavor, if the Supply Company shall so desire, to obtain any consent necessary by the other party, or parties, to the contract to permit the assignment of such rights or interests or such obligations, and thereafter make such assignment. In any case where such consent cannot be obtained, then, if the Supply Company shall so request, the American Company shall cooperate with the Supply Company to the end that the obligations of the American Company shall be performed in such manner that the value and benefits of the contract in question shall be preserved and shall inure directly or indirectly to the benefit of the Supply Company.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be signed in their respective corporate

Agreement Dated December 19, 1945, between American Well and Prospecting Company and Bethlehem Supply Company (Exhibit 8-H to the Stipulation of Facts)

names by their respective Presidents or one of their respective Vice-Presidents and their respective corporate seals to be hereunto affixed and to be attested by their respective Secretaries or one of their respective Assistant Secretaries as of the day and year first above written.

AMERICAN WELL AND PROSPECTING COMPANY,

by R. E. McMATH
Vice-President.

Attest:

A. J. SLATER
Assistant Secretary.

BETHLEHEM SUPPLY COMPANY,

by F. A. SHICK
Vice-President.

Attest:

W. M. DRIVER
Assistant Secretary.

Balance Sheet of American Well and Prospecting Company at December 31, 1945 (Exhibit 9-I to the Stipulation of Facts)

AMERICAN WELL AND PROSPECTING COMPANY

BALANCE SHEET—DECEMBER 31, 1945

ASSETS		
Current Assets:		
Cash	$ 2,808	
Inventories	2,312,815	
Accounts receivable (less reserve $15,065)	382,104	$2,697,727
Deferred Notes Receivable		8,000
Capital Assets:		
Property account	1,413,906	
Less—Reserve for depreciation	1,055,553	358,353
		$3,064,080

LIABILITIES		
Current Liabilities:		
Accounts payable	$2,109,118	
Payrolls	14,394	
Accrued taxes	30,152	
Taxes collected from employees and others	11,791	
Other	3,696	$2,169,151
Capital Liabilities:		
Capital Stock:		
1,000 shares ($100 par value each)		100,000
Surplus:		
Paid in	46,514	
Earned	748,415	794,929
		$3,064,080

Minutes of Meeting of Stockholders of American Well and Prospecting Company Held April 16, 1946 (Exhibit 10-J to the Stipulation of Facts)

The Annual Meeting of the Stockholders of AMERICAN WELL AND PROSPECTING COMPANY, a Texas corporation, was held at No. 701 East Third Street, Bethlehem, Pennsylvania, on the 16th day of April, 1946, at 10:30 o'clock in the forenoon, pursuant to a consent and waiver of notice signed by the holder of all the issued and outstanding capital stock of the Company.

In the absence of the President and the Vice Presidents of the Company, Mr. L. D. Brown, a proxy holder, was chosen Chairman of the meeting and presided thereat, and, in the absence of the Secretary of the Company, Mr. W. H. Johnstone, an Assistant Secretary of the Company, kept the minutes thereof.

The Secretary of the meeting called the roll and reported that Bethlehem Steel Company, the registered holder of 1,000 shares, being all the issued and outstanding capital stock of the Company, was represented at the meeting by its proxies, L. D. Brown and W. H. Johnstone.

The Chairman thereupon announced that a quorum was present.

The Secretary of the meeting submitted a waiver of the notice of this meeting and consent to the holding thereof signed by the registered holder of all the issued and outstanding capital stock of the Company.

On motion, duly made and seconded, the following resolution was unanimously adopted:

RESOLVED that the original of the waiver of notice of this meeting and consent to the holding thereof be

Minutes of Meeting of Stockholders of American Well and Prospecting Company Held April 16, 1946 (Exhibit 10-J to the Stipulation of Facts)

filed and preserved among the records of the Company and that a copy thereof be incorporated in the minutes of this meeting.

Such copy is as follows:

AMERICAN WELL AND PROSPECTING COMPANY

CONSENT AND WAIVER OF NOTICE OF ANNUAL MEETING OF STOCKHOLDERS

The undersigned, being the registered owner of all the issued and outstanding shares of the capital stock of AMERICAN WELL AND PROSPECTING COMPANY, a Texas corporation, DOES HEREBY WAIVE notice of the time, place and objects of the annual meeting of the stockholders of said Company scheduled pursuant to its By-laws to be held on the 16th day of April, 1946, at 10:30 o'clock in the forenoon, at 701 E. Third Street, Bethlehem, Pa., and consent that such meeting be held at said time and place for the following purposes:

1. To elect five directors to hold office for the ensuing year.

2. To consider and, if satisfactory, to ratify and approve all action taken by the Board of Directors of said Company since the 17th day of April, 1945.

3. To transact such other business as may properly come before said meeting.

Minutes of Meeting of Stockholders of American Well and Prospecting Company Held April 16, 1946 (Exhibit 10-J to the Stipulation of Facts)

AND THE UNDERSIGNED DOES HEREBY WAIVE any and all notice and requirements provided for by the Constitution or laws of the State of Texas or by the By-laws of said Company or otherwise.

Dated: April 16, 1946.

BETHLEHEM STEEL COMPANY

by

Attest:
W. H. Johnstone
Assistant Secretary.

R. E. McMath
Vice President.
(Corporate Seal)

The minutes of the annual meeting of the stockholders of the Company held on April 17, 1945, were submitted to the meeting, and, on motion, duly made and seconded, in all respects approved.

The Chairman stated that the next business to come before the meeting was the election of five directors, each to hold office until the annual meeting of the stockholders to be held in the year 1947 and until his successor shall have been elected and qualified in his stead or as otherwise provided in the By-laws of the Company.

The Secretary of the meeting submitted a complete, certified list of the stockholders of the Company entitled to vote at the meeting, arranged in alphabetical order, as required by law and stated that said certified list had been prepared at least five days before this meeting and had been kept open at the place of this meeting for said five

Minutes of Meeting of Stockholders of American Well and Prospecting Company Held April 16, 1946 (Exhibit 10-J to the Stipulation of Facts)

days subject to the examination of any stockholder. A copy of said certified list is as follows:

AMERICAN WELL AND
PROSPECTING COMPANY

CERTIFIED LIST OF STOCKHOLDERS

I, W. M. Driver, Assistant Secretary of American Well and Prospecting Company, a Texas corporation, hereby certify that the following is a full, true and correct list in alphabetical order of the stockholders of record of said Company on the date hereof:

Name	Residence	No. of Shares
Bethlehem Steel Company	Bethlehem, Pa.	1,000

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of said Company this 11th day of April, 1946.

(Corporate Seal)

W. M. DRIVER
Assistant Secretary.

Minutes of Meeting of Stockholders of American Well and Prospecting Company Held April 16, 1946 (Exhibit 10-J to the Stipulation of Facts)

The Secretary of the meeting stated that there had not been any transfers of stock on the books of the Company since the making of said certified list or within ten days next preceding the meeting, and that the stockholder named in said certified list was entitled to vote for all purposes at this meeting according to the number of shares set opposite its name.

The stock books of the Company were presented to the meeting and they, together with the certified list of stockholders which had previously been submitted to the meeting, remained open to inspection during the meeting.

Nominations for directors having been called for, Messrs. Quincy Bent, N. Berkeley, Paul Mackall, R. E. McMath and F. A. Shick were duly nominated and all of said nominations were duly seconded.

There being no other nominations, the Chairman declared the polls open at 10:40 o'clock in the forenoon and the proxies for Bethlehem Steel Company prepared their ballot in writing and presented it to the Secretary of the meeting. The vote for the election of directors having been taken, the Chairman ordered the polls closed and the Secretary of the meeting, having canvassed the vote cast, reported that Messrs. Quincy Bent, N. Berkeley, Paul Mackall, R. E. McMath and F. A. Shick had been duly elected directors of the Company by the unanimous vote of the registered holder of all the issued and outstanding capital stock of the Company. Said report of the Secretary was, on motion, duly made and seconded, accepted, and the Chairman declared that Messrs. Quincy Bent, N. Berkeley, Paul Mackall, R. E. McMath and F. A. Shick had been duly elected directors of the Company, each to continue in office until the annual

Minutes of Meeting of Stockholders of American Well and Prospecting Company Held April 16, 1946 (Exhibit 10-J to the Stipulation of Facts)

meeting of the stockholders to be held in the year 1947 and until his successor shall have been elected and qualified or as otherwise provided in the By-laws.

The Secretary of the meeting submitted the minute book of the Company containing the minutes of all meetings of the Board of Directors of the Company held since the 17th day of April, 1945.

Thereupon, on motion, duly made and seconded, the following resolution was unanimously adopted:

> RESOLVED that the minutes of the meetings of the Board of Directors of the Company held since the 17th day of April, 1945, and all action therein and thereby shown to have been taken, approved or authorized, by said Board or by the officers of the Company, be, and they hereby are, in all respects, adopted, approved, ratified and confirmed and that in general all things done or caused to be done by said Board or by said officers or any of them in the conduct of the business of the Company be, and they hereby are, in all respects, adopted, approved, ratified and confirmed.

The Chairman directed the Secretary of the meeting to file among the records of the Company the certified list of stockholders, the proxies and the ballots which had been presented to the meeting.

There being no further business to come before the meeting, it was, on motion, duly made and seconded, adjourned.

LDB L. D. BROWN
Chairman

WHJ W. H. JOHNSTONE
Secretary of the Meeting

Minutes of Meeting of Stockholders of American Well and Prospecting Company Held April 15, 1947 (Exhibit 11-K to the Stipulation of Facts)

The Annual Meeting of the Stockholders of AMERICAN WELL AND PROSPECTING COMPANY, a Texas corporation, was held at No. 701 East Third Street, Bethlehem, Pennsylvania, on the 15th day of April, 1947, at 10:30 o'clock in the forenoon, pursuant to a consent and waiver of notice signed by the holder of all the issued and outstanding capital stock of the Company.

In the absence of the President and the Vice-Presidents of the Company, Mr. L. D. Brown, a proxy holder, was chosen Chairman of the meeting and presided thereat, and, in the absence of the Secretary of the Company, Mr. W. H. Johnstone, an Assistant Secretary of the Company, kept the minutes thereof.

The Secretary of the meeting called the roll and reported that Bethlehem Steel Company, the registered holder of 1,000 shares, being all the issued and outstanding capital stock of the Company, was represented at the meeting by its proxies, L. D. Brown and W. H. Johnstone.

The Chairman thereupon announced that a quorum was present.

The Secretary of the meeting submitted a waiver of the notice of this meeting and consent to the holding thereof signed by the registered holder of all the issued and outstanding capital stock of the Company.

On motion, duly made and seconded, the following resolution was unanimously adopted:

RESOLVED that the original of the waiver of notice of this meeting and consent to the holding thereof be filed and preserved among the records of the

Minutes of Meeting of Stockholders of American Well and Prospecting Company Held April 15, 1947 (Exhibit 11-K to the Stipulation of Facts)

Company and that a copy thereof be incorporated in the minutes of this meeting.

Such copy is as follows:

AMERICAN WELL AND PROSPECTING COMPANY

CONSENT AND WAIVER OF NOTICE OF ANNUAL MEETING OF STOCKHOLDERS

The undersigned, being the registered owner of all the issued and outstanding shares of the capital stock of AMERICAN WELL AND PROSPECTING COMPANY, a Texas corporation, DOES HEREBY WAIVE notice of the time, place and objects of the annual meeting of the stockholders of said Company scheduled pursuant to its By-laws to be held on the 15th day of April, 1947, at 10:30 o'clock in the forenoon, at 701 E. Third Street, Bethlehem, Pa., and consent that such meeting be held at said time and place for the following purposes:

1. To elect five directors to hold office for the ensuing year.
2. To consider, and, if satisfactory, to ratify and approve all action taken by the Board of Directors of said Company since the 16th day of April, 1946.
3. To transact such other business as may properly come before said meeting.

AND THE UNDERSIGNED DOES HEREBY WAIVE any and all notice and requirements provided for by the

Minutes of Meeting of Stockholders of American Well and Prospecting Company Held April 15, 1947 (Exhibit 11-K to the Stipulation of Facts)

Constitution or laws of the State of Texas or by the By-laws of said Company or otherwise.

Dated: April 14, 1947.

BETHLEHEM STEEL COMPANY

Attest:
A. J. Slater
Assistant Secretary

by R. E. McMath
Vice President
(Corporate Seal)

The minutes of the annual meeting of the stockholders of the Company held on April 16, 1946, were submitted to the meeting, and, on motion, duly made and seconded, in all respects approved.

The Chairman stated that the next business to come before the meeting was the election of five directors, each to hold office until the annual meeting of the stockholders to be held in the year 1948 and until his successor shall have been elected and qualified in his stead or as otherwise provided in the By-Laws of the Company.

The Secretary of the meeting submitted a complete, certified list of the stockholders of the Company entitled to vote at the meeting, arranged in alphabetical order, as required by law and stated that said certified list had been prepared at least five days before this meeting and had been kept open at the place of this meeting for said five days subject to the examination of any stockholder. A copy of said certified list is as follows:

Minutes of Meeting of Stockholders of American Well and Prospecting Company Held April 15, 1947 (Exhibit 11-K to the Stipulation of Facts)

AMERICAN WELL AND PROSPECTING COMPANY

CERTIFIED LIST OF STOCKHOLDERS

I, A. J. Slater, Assistant Secretary of American Well and Prospecting Company, a Texas corporation, hereby certify that the following is a full, true and correct list in alphabetical order of the stockholders of record of said Company on the date hereof:

Name	Residence	No. of Shares
Bethlehem Steel Company	Bethlehem, Pa.	1,000

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of said Company this 10th day of April, 1947.

A. J. Slater
Assistant Secretary.

(Corporate Seal)

The Secretary of the meeting stated that there had not been any transfers of stock on the books of the Company since the making of said certified list or within ten days next preceding the meeting, and that the stockholder named in said certified list was entitled to vote for all purposes at this meeting according to the number of shares set opposite its name.

The stock books of the Company were presented to the meeting and they, together with the certified list of stock-

Minutes of Meeting of Stockholders of American Well and Prospecting Company Held April 15, 1947 (Exhibit 11-K to the Stipulation of Facts)

holders which had previously been submitted to the meeting, remained open to inspection during the meeting.

Nominations for directors having been called for, Messrs. Quincy Bent, N. Berkeley, Paul Mackall, R. E. McMath and F. A. Shick were duly nominated and all of said nominations were duly seconded.

There being no other nominations, the Chairman declared the polls open at 10:40 o'clock in the forenoon and the proxies for Bethlehem Steel Company prepared their ballot in writing and presented it to the Secretary of the meeting. The vote for the election of directors having been taken, the Chairman ordered the polls closed and the Secretary of the meeting, having canvassed the vote cast, reported that Messrs. Quincy Bent, N. Berkeley, Paul Mackall, R. E. McMath and F. A. Shick had been duly elected directors of the Company by the unanimous vote of the registered holder of all the issued and outstanding capital stock of the Company. Said report of the Secretary was, on motion, duly made and seconded, accepted, and the Chairman declared that Messrs. Quincy Bent, N. Berkeley, Paul Mackall, R. E. McMath and F. A. Shick had been duly elected directors of the Company, each to continue in office until the annual meeting of the stockholders to be held in the year 1948 and until his successor shall have been elected and qualified or as otherwise provided in the By-laws.

The Secretary of the meeting submitted the minute book of the Company containing the minutes of all meetings of the Board of Directors of the Company held since the 16th day of April, 1946.

Minutes of Meeting of Stockholders of American Well and Prospecting Company Held April 15, 1947 (Exhibit 11-K to the Stipulation of Facts)

Thereupon, on motion, duly made and seconded, the following resolution was unanimously adopted:

> RESOLVED that the minutes of the meetings of the Board of Directors of the Company held since the 16th day of April, 1946, and all action therein and thereby shown to have been taken, approved or authorized, by said Board or by the officers of the Company, be, and they hereby are, in all respects, adopted, approved, ratified and confirmed and that in general all things done or caused to be done by said Board or by said officers or any of them in the conduct of the business of the Company be, and they hereby are, in all respects, adopted, approved, ratified and confirmed.

The Chairman directed the Secretary of the meeting to file among the records of the Company the certified list of stockholders, the proxies and the ballots which had been presented to the meeting.

There being no further business to come before the meeting, it was, on motion, duly made and seconded, adjourned.

LDB L. D. BROWN
Chairman

WHJ W. H. JOHNSTONE
Secretary of the Meeting

Minutes of Meeting of Board of Directors of American Well and Prospecting Company held April 22, 1946 (Exhibit 12-L to the Stipulation of Facts)

A Special Meeting of the Board of Directors of AMERICAN WELL AND PROSPECTING COMPANY, a Texas corporation, was held at the office of Bethlehem Steel Company in Bethlehem, Pennsylvania, on the 22nd day of April, 1946, at 2:10 o'clock in the afternoon, pursuant to a consent and waiver of notice signed by all the directors of the Company.

The following directors were present:

Messrs. Quincy Bent,
N. Berkeley,
Paul Mackall,
R. E. McMath and
F. A. Shick,

being all the members of the Board.

Mr. Paul Mackall, the President of the Company, acted as Chairman of the meeting, and Mr. R. E. McMath, the Secretary of the Company, kept the minutes thereof.

The Secretary presented to the meeting a written consent to the holding of the meeting and waiver of notice thereof signed by all the members of the Board, a copy of which is as follows:

AMERICAN WELL AND PROSPECTING COMPANY

WAIVER OF NOTICE

Meeting of Board of Directors

We, the undersigned, Directors of the above named corporation, organized and existing under the laws of

Minutes of Meeting of Board of Directors of American Well and Prospecting Company held April 22, 1946 (Exhibit 12-L to the Stipulation of Facts)

the State of Texas, do hereby waive notice of the time, place and objects of a special meeting of the Board of Directors of said corporation, to be held on the 22nd day of April, 1946, at 2:10 o'clock in the afternoon, at the office of Bethlehem Steel Company, Bethlehem, Pennsylvania, and we do hereby consent to the holding of said meeting at said time and place and to the transaction thereat of any business that may come before said meeting.

Dated: April 22, 1946.

Quincy Bent — Paul Mackall
N. Berkeley — R. E. McMath
F. A. Shick

The Secretary reported to the meeting that at the annual meeting of the stockholders of the Company held on April 16, 1946, Messrs. Quincy Bent, N. Berkeley, Paul Mackall, R. E. McMath and F. A. Shick had been duly elected directors of the Company, each to hold office until the annual meeting of the stockholders to be held in the year 1947 and until his successor shall have been chosen and qualified or as otherwise provided in the By-laws of the Company.

The Chairman stated that this meeting had been called for the purpose of organization and the election of officers for the ensuing year and for any other business that may properly come before the meeting.

Thereupon, the following were unanimously elected to hold the offices set opposite their respective names, each to hold such office until his successor shall have been chosen:

Minutes of Meeting of Board of Directors of American Well and Prospecting Company held April 22, 1946 (Exhibit 12-L to the Stipulation of Facts)

President	Mr. Paul Mackall
Vice President	Mr. R. E. McMath
Vice President	Mr. F. A. Shick
Vice President	Mr. J. M. Larkin
Vice President	Mr. G. A. Tompson
Secretary	Mr. R. E. McMath
Assistant Secretary	Mr. W. H. Johnstone
Assistant Secretary	Mr. W. M. Driver
Assistant Secretary	Mr. A. J. Slater
Assistant Secretary	Mr. A. Arthur Jenkins
Assistant Secretary	Mr. R. G. Petri
Treasurer	Mr. J. P. Bender
Assistant Treasurer	Mr. Wm. J. Brown
Assistant Treasurer	Mr. C. E. Snyder
Assistant Treasurer	Mr. A. W. Tarkington
Comptroller	Mr. F. A. Shick
Assistant Comptroller	Mr. R. H. Schlottman
Assistant Comptroller	Mr. W. H. Vannatta
Assistant Comptroller	Mr. H. J. Harper
Auditor	Mr. R. G. Petri

The Chairman directed that the Secretary and the Assistant Secretaries elected at this meeting be sworn to the faithful discharge of their duties as such officers, respectively, and that an oath to such effect be procured from each of them and filed among the records of the Company.

There being no further business to come before the meeting, it was, on motion, duly made and seconded, adjourned.

R. E. McMath
Secretary

Minutes of Meeting of Board of Directors of American Well and Prospecting Company Held April 28, 1947 (Exhibit 13-M to the Stipulation of Facts)

A Special Meeting of the Board of Directors of AMERICAN WELL AND PROSPECTING COMPANY, a Texas corporation, was held at the office of Bethlehem Steel Company in Bethlehem, Pennsylvania, on the 28th day of April, 1947, at 2:15 o'clock in the afternoon, pursuant to a consent and waiver of notice signed by all the directors of the Company.

The following directors were present:

Messrs. Quincy Bent,
N. Berkeley,
Paul Mackall,
R. E. McMath and
F. A. Shick,

being all the members of the Board.

Mr. Paul Mackall, the President of the Company, acted as Chairman of the meeting, and Mr. R. E. McMath, the Secretary of the Company, kept the minutes thereof.

The Secretary presented to the meeting a written consent to the holding of the meeting and waiver of notice thereof signed by all the members of the Board, a copy of which is as follows:

AMERICAN WELL AND PROSPECTING COMPANY

WAIVER OF NOTICE

Meeting of Board of Directors

We, the undersigned, Directors of the above named corporation, organized and existing under the laws of

Minutes of Meeting of Board of Directors of American Well and Prospecting Company Held April 28, 1947 (Exhibit 13-M to the Stipulation of Facts)

the State of Texas, do hereby waive notice of the time, place and objects of a special meeting of the Board of Directors of said corporation, to be held on the 28th day of April, 1947, at 2:15 o'clock in the afternoon, at the office of Bethlehem Steel Company, Bethlehem, Pennsylvania, and we do hereby consent to the holding of said meeting at said time and place and to the transaction thereat of any business that may come before said meeting.

Dated: April 28, 1947.

Quincy Bent — Paul Mackall
N. Berkeley — R. E. McMath
F. A. Shick

The Secretary reported to the meeting that at the annual meeting of the stockholders of the Company held on April 15, 1947, Messrs. Quincy Bent, N. Berkeley, Paul Mackall, R. E. McMath and F. A. Shick had been duly elected directors of the Company, each to hold office until the annual meeting of the stockholders to be held in the year 1948 and until his successor shall have been chosen and qualified or as otherwise provided in the By-laws of the Company.

The Chairman stated that this meeting had been called for the purpose of organization and the election of officers for the ensuing year and for any other business that may properly come before the meeting.

Minutes of Meeting of Board of Directors of American Well and Prospecting Company Held April 28, 1947 (Exhibit 13-M to the Stipulation of Facts)

Thereupon, the following were unanimously elected to hold the offices set opposite their respective names, each to hold such office until his successor shall have been chosen:

President	Mr. Paul Mackall
Vice President	Mr. R. E. McMath
Vice President	Mr. F. A. Shick
Vice President	Mr. J. M. Larkin
Vice President	Mr. G. A. Tompson
Secretary	Mr. R. E. McMath
Assistant Secretary	Mr. W. H. Johnstone
Assistant Secretary	Mr. W. M. Driver
Assistant Secretary	Mr. A. J. Slater
Assistant Secretary	Mr. A. Arthur Jenkins
Assistant Secretary	Mr. R. G. Petri
Treasurer	Mr. J. P. Bender
Assistant Treasurer	Mr. Wm. J. Brown
Assistant Treasurer	Mr. C. E. Snyder
Assistant Treasurer	Mr. A. W. Tarkington
Comptroller	Mr. F. A. Shick
Assistant Comptroller	Mr. R. H. Schlottman
Assistant Comptroller	Mr. H. J. Harper
Auditor	Mr. R. G. Petri

The Chairman directed that the Secretary and the Assistant Secretaries elected at this meeting be sworn to the faithful discharge of their duties as such officers, respectively, and that an oath to such effect be procured from each of them and filed among the records of the Company.

Minutes of Meeting of Board of Directors of American Well and Prospecting Company Held April 28, 1947 (Exhibit 13-M to the Stipulation of Facts)

There being no further business to come before the meeting, it was, on motion, duly made and seconded, adjourned.

R. E. McMath
Secretary

Minutes of Meeting of Board of Directors of American Well and Prospecting Company Held November 3, 1947 (Exhibit 14-N to the Stipulation of Facts)

A Special Meeting of the Board of Directors of AMERICAN WELL AND PROSPECTING COMPANY, a Texas corporation, was held at the office of Bethlehem Steel Company in Bethlehem, Pennsylvania, on the 3rd day of November, 1947, at 2:25 o'clock in the afternoon, pursuant to a consent and waiver of notice signed by all the directors of the Company.

The following directors were present:

Messrs. N. Berkeley,
Paul Mackall,
R. E. McMath and
F. A. Shick,

constituting a majority of the Board and a quorum.

Mr. Paul Mackall, the President of the Company, acted as Chairman of the meeting, and Mr. R. E. McMath, the Secretary of the Company, kept the minutes thereof.

The Secretary presented to the meeting a written consent to the holding of the meeting and waiver of notice thereof signed by all the members of the Board, a copy of which is as follows:

AMERICAN WELL AND PROSPECTING COMPANY

WAIVER OF NOTICE

Meeting of Board of Directors

We, the undersigned, Directors of the above named corporation, organized and existing under the laws of the State of Texas, do hereby waive notice of the time, place and objects of a special meeting of the Board of Directors of said corporation, to be held on the 3rd day of November, 1947, at 2:25 o'clock in the after-

Minutes of Meeting of Board of Directors of American Well and Prospecting Company Held November 3, 1947 (Exhibit 14-N to the Stipulation of Facts)

noon, at the office of Bethlehem Steel Company, Bethlehem, Pennsylvania, and we do hereby consent to the holding of said meeting at said time and place and to the transaction thereat of any business that may come before said meeting.

Dated: November 3, 1947.

Quincy Bent — Paul Mackall
N. Berkeley — R. E. McMath
F. A. Shick

The minutes of the Special Meeting of the Board of Directors held on April 28, 1947, were presented to the meeting, and, on motion, duly made and seconded, in all respects approved as recorded.

The Chairman presented to the meeting the resignation of Mr. Quincy Bent as a director of this Company, effective November 3, 1947, and suggested that action be taken at this meeting to fill the vacancy.

Thereupon, on motion, duly made and seconded, the following resolution was unanimously adopted:

RESOLVED that Mr. S. J. Cort be, and he hereby is, elected a director of this Company to fill the vacancy caused by the resignation of Mr. Quincy Bent.

There being no further business to come before the meeting, it was, on motion, duly made and seconded, adjourned.

R. E. McMATH
Secretary

Office-Supreme Court, U.S.
FILED
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JOHN T. FEY, Clerk

No. 258

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

AMERICAN WELL AND PROSPECTING COMPANY,
Petitioner,
—*against*—
COMMISSIONER OF INTERNAL REVENUE,
Respondent.
No. 11,588

PETITION FOR REHEARING

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit:

Now comes the petitioner, by its counsel, and respectfully prays this Court that this case be reheard and reconsidered, for the following reasons:

1. *This Court held that the taxpayer was de facto dissolved on January 2, 1946, because (i) there was no business purpose for its continued existence and (ii) it was kept alive for tax evasion purposes, whereas*

(a) *the Tax Court found that the taxpayer remained in existence for a proper business purpose;*

(b) *the Tax Court's finding not only was supported by substantial evidence, but also was undisputed and*

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adopted by the Commissioner in his brief in phrasing the question presented by the appeal;

(c) *the Commissioner has not contended that the taxpayer was kept alive to avoid tax; and*

(d) *there was in fact no avoidance of tax.*

2. *Since the taxpayer was continued in existence for a proper business purpose and since there was no tax avoidance, the decision of the Tax Court which is based on a ground repudiated by this Court and other Courts of Appeals, should be reversed.*

I.

THIS COURT DECIDED THE CASE ON A GROUND WHICH IS CONTRARY TO A FINDING OF FACT BY THE TAX COURT THAT WAS BASED ON SUBSTANTIAL EVIDENCE.

The taxpayer on January 2, 1946, *sold* all its *assignable* assets to Bethlehem Supply Company (Supply), a corporation which was engaged in the same type of business as the taxpayer (13a). The taxpayer agreed to collect some $300,000 in *unassignable* claims against the United States which had arisen in its business and, when it had finished collecting them, to transfer the proceeds thereof to Supply. This problem of collecting non-assignable claims does not arise where the business assets are transferred to a stockholder in liquidation (*Novo Trading Corporation* v. *Commissioner*, 113 F. 2d 320 (2nd Cir. 1940)) but does arise on a sale to a third party (*United States* v. *Shannon*, 342 U. S. 288 (1952)). If the taxpayer had sold those claims to Supply on January 2, 1946, they would have become

void.* The taxpayer had not finished collecting such unassignable claims by the end of 1946 (13a, 16a, 17a, 24a).

This Court's decision that the taxpayer was not entitled to an excess profits credit for the calendar year 1946 is predicated upon its finding that the taxpayer was *de facto* dissolved on January 2, 1946, when it transferred all its *assignable* assets** to Supply, because (1) the taxpayer was kept alive "only for purposes of tax evasion" (p. 8 of the opinion), and (2) there was no business reason after that date for continuing the taxpayer's existence (p. 9 of the opinion).

The Tax Court found, however, that the taxpayer

> "remained in existence to cooperate with the purchaser [of its assets] so that the latter might derive the benefit of certain contracts and claims that were unassignable" (3a).***

That undisputed finding of the Tax Court is in direct conflict with this Court's finding of *de facto* dissolution because there was no business reason for continuing the taxpayer's existence.

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*The relevant part of 10 Stat. 170, as amended, Section 203, Title 31, United States Code reads as follows:

> "All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share, thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. * * *"

**This Court correctly states that the taxpayer transferred only its assignable assets (p. 2), but later (p. 8) when finding that there was no business purpose for the taxpayer's continued existence, incorrectly states that Supply "had acquired all the taxpayer's assets".

***Headnotes of Tax Court opinions are prepared by the Court and are considered to be a part of the Findings of Fact and Opinion

The Commissioner, far from contesting the Tax Court's finding, accepted it in his brief and incorporated it in his statement of the question presented by the appeal, stating that the taxpayer

> "remained in existence to cooperate with the purchaser so that the latter might derive the benefit of certain contracts and claims that were unassignable" (Br., p. 2).

The Tax Court's finding of fact that the taxpayer remained in existence for the business purpose of cooperating with the purchaser of its assets in connection with the collection of unassignable claims is supported by substantial evidence. The Tax Court found that the taxpayer had claims against the United States, which arose out of the business it had formerly conducted, in the amount of approximately $300,000 (6a). Those claims were not assigned by the taxpayer on January 2, 1946. They were nonassignable because of the provisions of 10 Stat. 170, as amended, Section 203, Title 31, United States Code, *supra*. If the taxpayer had sold them to Supply on January 2, 1946, they would have become *void*. *United States* v. *Shannon*, 342 U. S. 288 (1952), *supra*.

Accordingly, it was necessary that the taxpayer remain in existence in order to collect those claims and complete its agreement by transmitting the proceeds of the claims to Supply, the purchaser of its assets. We submit that it is a misstatement of law to say that the taxpayer collected those claims as agent for Supply, as stated in this Court's opinion (p. 7). Supply had no right to collect the claims and its agent could have no greater right than the principal. It was essential that the taxpayer collect those unassignable claims *in its own right*. It is stipulated that the taxpayer

acted through its officers (who were also officers of Supply) in collecting the claims (7a). If there was any agency involved it was the other way around, i.e., Supply acted as agent for the taxpayer in collecting the claims.

The crux of this Court's holding is contained in the following two sentences in its opinion (p. 9):

> "In any event, there could be only two reasons for keeping a corporation alive under the circumstances of the case at bar in 1946: to avoid taxes, or to have a spare corporate charter conveniently ready for use whenever desired by the parent corporation. Neither is a sufficient business purpose of the taxpayer to negate the Tax Court's finding that the taxpayer in the case at bar was not entitled to an unused excess profits credit carry-back from the tax year 1946."

But the Tax Court had already made an undisputed finding as to the business reason for continuing the taxpayer's existence, namely, so that the purchaser of its assets might derive the benefit of unassignable claims. We do not see how the above quotation from this Court's opinion setting forth two wholly different reasons (neither of which appears to us to find support in the record) can stand in the light of the Tax Court's finding of fact that there was a business purpose for continuing the taxpayer's existence.

That the $300,000 of non-assignable claims were not shown on the taxpayer's balance sheet after January 2, 1946, is not of any importance, because good accounting practice would not permit such claims to be shown as an asset unless a like amount were set up as a liability on the other side of the balance sheet. It is stipulated that the taxpayer owned them and did not collect any of them until

May, 1946 (15a) and that some $25,000 remained uncollected at December 31, 1946 (16a).

Surely, the collection of non-assignable claims arising out of its business which it owned and which only it could collect was a part of the orderly winding up of a taxpayer's affairs which this Court has held to be proper corporate business. *Commissioner* v. *Wayne Coal Mining Company*, 209 F. 2d 152 (3rd Cir. 1954). The collection of accounts receivable has always been considered a proper reason to delay dissolution. Admittedly, counsel for the taxpayer could not properly have advised that the taxpayer be dissolved prior to the collection of the non-assignable claims against the United States nor, indeed, was such dissolution advisable until the termination in 1948 of a pending suit against the taxpayer for $219,000 (7a). By that time, the taxpayer was actively engaged in another business (8a).

This Court's opinion indicates that it was under the misapprehension that the Tax Court had found that the taxpayer was *de facto* dissolved on January 2, 1946, and that it was merely affirming that finding. On the contrary, as pointed out above, the Tax Court found that there was a proper business purpose for continuing the taxpayer's existence, as indeed there was, in order to avoid forfeiture of the unassignable claims.

The Tax Court did not find that the taxpayer was *de facto* dissolved in 1946. When the Tax Court in this type of case makes a finding of *de facto* dissolution, it does so in unequivocal language. For instance, in *A B C Brewing Corp.*, 20 T. C. 515 (1953), the Tax Court found (p. 527):

> "On the facts in the instant case, we think that the petitioner must be held to have been de facto dissolved at the beginning of the fiscal year 1945 and, consequently, not entitled to a carry-back of excess profits credit from that year or from 1946."

The United States Court of Appeals for the Ninth Circuit refused to reverse that finding of fact because it was supported by substantial evidence (224 F. 2d 483 (9th Cir. 1955)). Hence in the instant case, this Court may not properly reverse the finding of fact that the taxpayer's existence was continued for a proper business purpose.

There was in Fact No Avoidance of Tax

This Court's implication that the taxpayer was "kept alive only for purposes of tax evasion" (p. 8) and its statement that the taxpayer was kept alive "to avoid taxes" (p. 9), are, as pointed out above, not only contrary to the Tax Court's finding of fact, but do not have any support in the record.

The Commissioner has never urged that the taxpayer was kept alive for purposes of tax evasion or avoidance. On the contrary, the Commissioner has admitted that any "abuse" of the carry-back provisions by the taxpayer would have been "unintentional" (Br., p. 12).

Since the Commissioner did not take the position that the taxpayer's existence was continued for tax evasion purposes, it was not part of the taxpayer's burden of proof to counteract a non-existent charge. We believe that, in fairness, the taxpayer should be permitted to present facts to rebut a charge of tax evasion now made for the first time.

The fact is that *no tax was avoided by the sale of the taxpayer's business to Supply.*

The taxpayer lost money in 1945 (Exhibit 3-C). If the taxpayer's business in the hands of Supply also lost money in 1946 (which we believe to be the case), then the taxpayer would have been entitled to the same unused excess profits credit carry-back for 1946 it is now claiming,

plus an operating loss carry-back, if it had not sold its business to Supply on January 2, 1946. Accordingly, the Treasury would not have collected any more tax from the taxpayer if it had retained its business for all of 1946 (instead of selling it on January 2, 1946) than the Treasury would collect if the instant case were decided in the taxpayer's favor.

On the other hand, if (contrary to what we believe to be true) the former business of the taxpayer produced net income in 1946 in the hands of Supply, there was still no tax advantage to the Bethlehem group by reason of the transfer of the business to Supply, and hence there could be no tax evasion motive.

Supply's operations in 1946, taking into account any 1946 income from the business of the taxpayer, resulted in a net loss for 1946. Hence Supply had an unused excess profits credit carry-back and a net operating loss carry-back from 1946 to 1944 and 1945 which resulted in a refund of part of the excess profits tax which it paid in those years. Any 1946 income from the assets which the taxpayer transferred to Supply merely reduced the carry-back of Supply (instead of the carry-back of the taxpayer) and at least correspondingly reduced Supply's refund of excess profits tax. *Accordingly, the excess profits tax collected by the Treasury would have been no less had the taxpayer operated its business for all of 1946, instead of selling it to Supply.* Any lessening of the taxpayer's carry-back by any income from that business which would have occurred had the taxpayer retained it during 1946 was compensated for by a decreased carry-back to Supply, the new owner of the business. Thus on the assumption that the taxpayer's assets produced income in 1946, this Court's decision, instead of preventing a supposed tax *advantage* arising from

the sale of the taxpayer's assets (as this Court apparently thought it was doing), actually *penalizes* a transaction which could not result in decreasing the excess profits tax collected by the Treasury.*

Since there was no avoidance of tax, the continued existence of the taxpayer could not possibly have been, as stated by this Court, "only for purposes of tax evasion" (p. 8), or "to avoid taxes" (p. 9). Those references should, therefore, be eliminated from this Court's opinion.

II.

SINCE THE TAXPAYER WAS CONTINUED IN EXISTENCE FOR A PROPER BUSINESS PURPOSE AND SINCE THERE WAS NO TAX AVOIDANCE, THE DECISION OF THE TAX COURT, WHICH IS BASED ON A GROUND REPUDIATED BY THIS COURT AND OTHER COURTS OF APPEALS, SHOULD BE REVERSED.

We believe it will be apparent to this Court that since the taxpayer was continued in existence for a proper business purpose and since there was no tax evasion or avoidance, the decision of the Tax Court must be reversed. That is true even though, as stated on p. 6 of this Court's opinion, the question is considered on the assumption that the taxpayer had "eventually been liquidated without acquiring any additional operating assets".

On the basis of what we believe to be controlling authority, corporations which are continued in existence to collect accounts receivable after they have disposed of their assets preparatory to liquidating are entitled to an excess profits credit under the mandatory wording of Section 710 of the

*The facts contained in this paragraph are not in the record as no charge of tax evasion or avoidance has previously been made.

Internal Revenue Code of 1939, where they are not kept alive merely for tax evasion purposes. *Commissioner* v. *Allegheny Broadcasting Corporation*, 179 F. 2d 844 (3rd Cir. 1950); *Wier Long Leaf Lumber Co.* v. *Commissioner*, 173 F. 2d 549 (5th Cir. 1949) [as to the tax year 1943]; *Bowman* v. *Glenn*, 84 F. Supp. 200 (W. D. Ky. 1949), affirmed 184 F. 2d 670 (6th Cir. 1950); *United States* v. *Kingman*, 170 F. 2d 408 (5th Cir. 1948).

With the finding of a proper business purpose for the continued existence of the taxpayer, and absent any tax evasion or tax avoidance, the language of this Court in the *Allegheny Broadcasting Corporation* case, *supra*, is particularly relevant (p. 848 of 179 F. 2d):

> "We do not have here a case in which the corporate existence was continued solely for the purpose of avoiding taxation for the Tax Court has found that the dissolution of KQV was deferred for adequate reasons. Accordingly we are not called upon to consider the case upon the theory that it discloses an attempt to evade the intent of the act."

It appears to us that the opinion of this Court, if unchanged, would overrule *sub silencio* the decision of this Court in the *Allegheny Broadcasting Corporation* case,* *supra*, in which this Court refused to hold that a corporation was dissolved *de facto* during the calendar year 1945 even though it had adopted a resolution of liquidation and dissolution, transferred *all its assets* (p. 554 of 12 T. C.) to its stockholders (who assumed its liabilities) in liquidation on February 28, 1945, and thereafter ceased to do business. The only activities in which the corporation there involved was engaged after February 28, 1945, were (1)

*Decided by a division of this Court which did not include the writer of the opinion in the instant case.

to determine its Pennsylvania unemployment compensation tax liability in the amount of less than $1,000 and (*2*) to file an application for excess profits tax relief under Section 722 of the Internal Revenue Code of 1939 with respect to the calendar year 1945. There, this Court accepted the Tax Court's finding that such activities constituted adequate reasons for delaying the formal dissolution of the corporation and refused to hold that the corporation was *de facto* dissolved at any time during the year 1945, even though it was formally dissolved as early as February 28, 1946. This Court cites the *Allegheny Broadcasting* case in footnote 8 on p. 7 of its opinion under the heading: "Cases where courts have found sufficient business activity to entitle corporations in liquidation to excess profits credits".

Since the taxpayer, on the authority of the cases above cited, would have been entitled to an excess profits credit and an unused excess profits credit carry-back from the taxable year 1946 even had it "eventually been liquidated without acquiring any additional operating assets", we believe that this Court must agree that the facts that the petitioner never passed a resolution of liquidation, never made any liquidating distributions and never showed any intention to liquidate or dissolve do not provide reasons for denying it the credit carry-back.

The importance of the retention by the taxpayer of its assets is that it did not, as did the corporations in *Winter & Company, Inc. (Indiana)*, 13 T. C. 108 (1949), and *Wheeler Insulated Wire Co.*, 22 T. C. 380 (1954) (relied upon by this Court in its opinion (p. 8)), destroy "its potentiality for the production of income by disposing of its capital", to quote the Tax Court in the *Winter* case, *supra* (p. 115 of 13 T. C.). If the taxpayer was a "shell" as

stated by this Court (p. 8), it was a shell that still retained its kernel. We submit that the real significance of the fact that the taxpayer used its retained capital to purchase another business in 1948 is that it shows that there was never any *intention* to liquidate or dissolve.

The crux of the Tax Court's decision in the instant case is shown by the following quotation from its opinion (9a, 10a):

> "The petitioner, at the beginning of 1946, disposed of the assets essential to the continued operation of the business which it had conducted with those or similar assets in 1944. Those assets were used during 1946 by Supply to carry on the business theretofore conducted by the petitioner. The results of the operation of that business during 1946 had no effect upon the petitioner but there might have been no excess profits credit to carry back to 1944 had the petitioner continued to conduct the business during 1946. Where the business was thus transferred to another and no longer operated by the petitioner, the latter was not intended by Congress to have the excess profits credit, wholly unnecessary for 1946, carried back to offset income of a year when the petitioner had operated the business."

In so holding, the Tax Court was merely following its own decision in *Wier Long Leaf Lumber Co.*, 9 T. C. 990 (1947), as to the year 1943, in which case the taxpayer had sold its business to a third party on December 24, 1942, but was engaged in 1943 in collecting its accounts receivable. The United States Court of Appeals for the Fifth Circuit reversed (173 F. 2d 549, *supra*), saying:

> "The fact of which the Commissioner makes so much, that before the end of 1942, the corporation had sold its mill and was no longer making

> money as an active sawmill company seems to us to be without significance here. * * * Finally, it is not claimed, it could not be, that the liquidation was entered upon here with any tax advantage purpose in mind. For it is clear from this record that the liquidation could not, and did not, confer any tax advantage."

Accordingly, the opinion of this Court, if unchanged, stands alone in holding that a corporation which after it sold its assets was engaged in collecting unassignable claims, which never passed a resolution of liquidation, which never made any liquidating distributions, which did not have any intention of liquidating or dissolving and which was not kept alive for tax avoidance purposes has somehow become *de facto* dissolved. We believe that such a decision is so far reaching in its implications as to deserve a rehearing and reconsideration by this Court.

Conclusion

In view of the fact that this Court apparently decided the case on a misunderstanding of the facts as to (i) the business purpose for the taxpayer's continued existence, and (ii) whether or not any tax had been avoided by the sale of the taxpayer's assets on January 2, 1946, this Court should grant a rehearing and set a date for reargument.

Respectfully submitted,

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Certificate of Counsel

I, GEORGE G. TYLER, counsel for the above-named petitioner, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

GEORGE G. TYLER

April 4, 1956.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

AMERICAN WELL AND PROSPECTING COMPANY,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 232 F. 2d 934. (Pet. Ex. A.) The opinion of the Tax Court (R. 3a–10a) [1] is reported at 23 T. C. 503.

JURISDICTION

The judgment of the Court of Appeals was entered on March 22, 1956 (Pet. Ex. B), and a petition for rehearing was denied on April 18, 1956 (Pet. Ex. C). The petition for certiorari was filed on July 17, 1956. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

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[1] Record references are to the appendix to the taxpayer's brief in the Court of Appeals.

QUESTION PRESENTED

The taxpayer corporation disposed of all of its assets and ceased operating its business as of December 31, 1945, but remained in existence during 1946 to cooperate with the purchaser of its assets so that the latter might derive the benefit of certain unassignable contracts and claims. The question presented is whether the taxpayer, on these facts, is entitled to carry-back an unused excess-profits credit for 1946 to 1944 under Section 710 of the Internal Revenue Code of 1939.

STATUTE AND REGULATIONS INVOLVED

Section 710 (a) (1), (b) (2) and (3), (c) (1), (2), and (3) (A) of the Internal Revenue Code of 1939, and Sections 35.710–1, 35.710–2, and 35.710–3 of Treasury Regulations 112, are set forth in the Appendix, *infra*, pages 15–20.

STATEMENT

The pertinent facts, as stipulated (R. 12a–18a) and as found by the Tax Court (R. 3a–8a), may be summarized as follows:

The taxpayer, a Texas corporation, was organized in 1931. For a number of years prior to 1946, the taxpayer was engaged in the business of manufacturing and selling oil-well rotary-drilling equipment and accessories and of manufacturing armaments for the United States Government. Bethlehem Steel Company, at all times material hereto a wholly owned subsidiary of Bethlehem Steel Corporation, acquired all of the outstanding stock of the taxpayer in 1944 and has since continued to own that stock. On December 19, 1945, the taxpayer entered into a contract with

Bethlehem Supply Company, hereinafter referred to as Supply, for the sale of all of its transferable assets and assumption of all of its transferable obligations and liabilities as of the opening of business on January 1, 1946. Supply was then and still is a wholly owned subsidiary of Bethlehem Steel Corporation. (R. 4a.)

The taxpayer agreed to sell to Supply all of its real property, machinery, equipment, raw materials, goods in process or completed, contracts and leases, patents, trademarks and trade names, cash and receivables, and all other property except certain unassignable rights and interests. The contract of sale also excluded the taxpayer's corporate records and franchise and certain equipment physically located in its plant but owned by the United States Government or agencies thereof. Supply agreed to assume, pay, perform, or discharge all of the liabilities and obligations of the taxpayer as of the opening of business on January 1, 1946, and further agreed to perform for the account of the taxpayer all obligations of the taxpayer with respect to certain contracts and leases relating to machinery and equipment owned by the United States Government and located at the taxpayer's plant. It was agreed that if the taxpayer subsequently purchased any such equipment it would, unless prohibited by its agreement with the Government, resell the same to Supply at cost. (R. 4a–5a.)

The contract further provided that as soon after the closing date as conveniently possible Supply would pay to the taxpayer for the properties to be sold an amount which would be the aggregate net book value

of such properties less the aggregate book value of all the liabilities and obligations of the taxpayer assumed by Supply. The taxpayer also agreed that, in the event any of the rights or interests or any of the obligations under any of its contracts were not assignable to Supply, it would seek to obtain any consents necessary to permit such assignments. The taxpayer was required to cooperate with Supply, if such consents could not be obtained, to the end that the obligations of the taxpayer should "be performed in such manner that the value and benefits of the contract in question shall be preserved and shall inure directly or indirectly to the benefit of the Supply Company." (R. 5a.)

The contract was closed on January 2, 1946, by the delivery of instruments of conveyance dated December 31, 1945, and by assumption by Supply of all liabilities and obligations of the taxpayer as of the opening of business on January 1, 1946. (R. 5a.)

Among the assets owned by the taxpayer and which were covered by the agreement were certain claims against the United States Government which were ~~opening of business on January 1,~~ largely settled ... 1946. (R. 5a.)

The taxpayer had correspondence in 1946 and 1947 with various United States Government departments with respect to clean-up work which it was obligated to do under the terms of contracts executed in prior years. The taxpayer purchased from the United States, in connection with this work, certain material and machinery owned by the Government but located on the property formerly owned by the taxpayer. The amounts necessary for such purchases were furnished

by Supply and the proceeds of the sales of such material and machinery were realized by Supply. The taxpayer, in October, 1951, settled for approximately $1,300 a claim asserted against it by the United States Government for defective material delivered prior to January 1, 1946. The settlement negotiations with respect to the foregoing claims and the purchases and sales of the machinery and other material were conducted by persons who were officers of the taxpayer and also officers of Supply, Bethlehem Steel Company, and Bethlehem Steel Corporation. These persons did not receive any compensation from the taxpayer during 1946 and 1947 and were compensated by one or more of the other companies. (R. 6a–7a.)

No entries of receipts or of disbursements were made on the taxpayer's books in connection with the settlement of the foregoing claims or in connection with the purchases and sales during the years 1946 and 1947 and all receipts or payments with respect thereto were or will be realized or made by Supply. A former employee of the taxpayer commenced an action in June, 1946, for alleged unpaid compensation in the amount of $219,000. The taxpayer filed an answer and took other action in that suit until November 1, 1948, when it was dismissed following the death of the plaintiff. The expenses of the litigation were borne partly by Supply and partly by former stockholders of the taxpayer from whom the Bethlehem Steel Company had purchased the taxpayer's stock. (R. 7a.)

The net proceeds of the sale of the taxpayer's properties were credited to the taxpayer in the inter-

company bank account maintained by subsidiary companies of Bethlehem Steel Corporation. No formal action to dissolve the taxpayer was ever taken by its board of directors or sole stockholder, and annual meetings of both were held during 1946 and 1947 for the purpose of electing directors and officers. The balance sheets of the taxpayer at the close of business on January 2, 1946, on December 31, 1946, and on December 31, 1947, were identical, consisting solely of accounts receivable in the intercompany bank account as assets and capital stock, paid-in surplus, and earned surplus in the capital accounts. (R. 7a–8a.)

The taxpayer acquired four sections of a dry dock in 1948 for approximately $800,000 and in 1949 purchased another section. The taxpayer's dry-dock facilities represented an investment of approximately $1,500,000 at the time of the hearing, and it was in the business of renting the dry dock. (R. 8a.)

In its excess-profits tax return for 1944, petitioner sought to carry-back an unused excess-profits credit for 1946 in the amount of $74,909.27. The Commissioner disallowed the attempted carry-back and determined a deficiency of $64,047.43. (R. 3a.) The Tax Court sustained the Commissioner's determination (R. 11a), and the Court of Appeals unanimously affirmed (Pet. Ex. B).

ARGUMENT

This case presents a narrow factual issue which does not merit review by this Court. Contrary to the assertion of the taxpayer, the case does not involve any questions of general importance. The decision

below is clearly correct and does not conflict with the decision of any other court of appeals.

1. Under the World War II excess-profits tax law, as set forth in Section 710 *et seq.* of the Internal Revenue Code of 1939[2] (Appendix, *infra*, pp. 15–17), normal profits are excluded from excess profits by means of an excess-profits credit, determined on the basis of invested capital or net income for a base period. This credit, if unused in the taxable year, could under certain circumstances be carried back for two years prior to the tax year. When the excess-profits tax was repealed as of December 31, 1945, the two-year carry-back provision was retained for a year beyond repeal in order "to be sure that business has the opportunity to apply reconversion expenditures to reduce wartime taxes." S. Rep. No. 655, 79th Cong., 1st Sess., p. 19. Thus, the unused excess-profits credit for 1946 could be carried back to 1944 and 1945.[3]

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[2] This law was added to the Internal Revenue Code of 1939 as Section 710 *et seq.* by Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974, applicable to taxable years beginning after December 31, 1939. References to "Code" or "Internal Revenue Code" are to the Internal Revenue Code of 1939 unless otherwise noted.

[3] Section 122 of the Revenue Act of 1945, c. 453, 59 Stat. 556, effective as of January 1, 1946. In this connection, Section 122 provides in part:

"SEC. 122. REPEAL OF EXCESS PROFITS TAX IN 1946.

"(a) *In General.*—The provisions of subchapter E of chapter 2 shall not apply to any taxable year beginning after December 31, 1945.

"(b) *Carry-backs From Years After 1945, Etc.*—Despite the provisions of subsection (a) of this section the provisions of subchapter E of Chapter 2 shall remain in force for the purposes of the determination of the taxes imposed by such subchapter for taxable years beginning before January 1, 1946, such determina-

The taxpayer corporation in the instant case was held not entitled to an unused excess-profits credit carry-back for 1946 when it had, as of the beginning of business on January 1, 1946, completely ceased its business operations.[4] The position of the Commissioner, as approved by both the Tax Court and the Court of Appeals for the Third Circuit, was that the taxpayer in the year 1946 was a mere corporate shell with no substance, and as such was not entitled to the relief provisions of the carry-back. This result is in harmony with the general rule that a corporation without a business purpose does not have to be treated as a corporation for tax purposes, and that the Commissioner may look through form to substance in order to protect the revenue. *Gregory* v. *Helvering*, 293 U. S. 465; *Higgins* v. *Smith*, 308 U. S. 473; *Commissioner* v. *National Carbide Corp.*, 167 F. 2d 304 (C. A. 2d), affirmed, 336 U. S. 422.

Whether a corporation is dissolved, *de facto* or *de jure*, presents a question of fact which must be considered in the light of the record of each particular case. In this case, the taxpayer sold all of its assets

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tion to be made as if subsection (a) had not been enacted but with the application of the amendments made by subsection (c) of this section and section 131 of this Act."

* * * * *

Subsection (c) of Section 122 amended Section 710 (c) of the Internal Revenue Code of 1939 so as to provide that there shall be no unused excess profits credit for a taxable year beginning after December 31, 1946.

[4] The Tax Court found that the taxpayer, at the beginning of 1946, had disposed of the assets essential to the continued operation of the business which it had conducted with those or similar assets in 1944 (R. 9a–10a); and that the business was no longer operated by the taxpayer (R. 10a).

to the Supply Company, a fellow subsidiary of Bethlehem Steel Corporation, the purchaser assuming the taxpayer's liabilities and obligations. (R. 4a–5a.) The net result of the sale was that the taxpayer divested itself of any and all business activity and became a corporation with one asset, namely, a credit in an intercompany bank account maintained in the name of subsidiary companies of Bethlehem Steel Corporation. (R. 7a.) Thus, at the beginning of 1946, the taxpayer was completely liquid, with its one asset, the bank balance, in the complete control of its sole stockholder, Bethlehem Steel Corporation. A transfer of this asset to the sole stockholder would have required no more than a simple bookkeeping entry.

The contention of the taxpayer that it was in existence in 1946 for a proper business purpose (Pet. 9–12) does not square with the findings of the Tax Court.[5]

[5] In this respect, the second question which the taxpayer presents (Pet. 2) inaccurately states that the Tax Court made a finding of fact "that the petitioner remained in existence in 1946 for a proper business purpose." A reading of the opinion of the Tax Court (R. 3a–10a) shows not only that such a finding was not made, but that on the contrary it was found (R. 9a–10a) that "The petitioner, at the beginning of 1946, disposed of the assets essential to the continued operation of the business which it had conducted with those or similar assets in 1944" and that "the business was thus transferred to another and no longer operated by the petitioner." The Tax Court found no more than that the taxpayer remained in technical legal existence. It did not find the taxpayer to be in existence for any business purpose. On the facts as found by the Tax Court, the Court of Appeals was clearly correct in holding that the taxpayer was *de facto* dissolved, and the fact that the Tax Court did not use the precise words "*de facto* dissolved" in nowise changes the correctness of the holding of the Court of Appeals.

As the Tax Court concluded, the taxpayer after January 1, 1946, "ceased to operate a business but remained in existence to cooperate with the purchaser so that the latter might derive the benefit of certain contracts and claims that were unassignable." (R. 3a.) While the taxpayer's name was used to consummate certain clean-up activities arising out of the transfer of the assets, these activities were for the benefit of the purchaser and were in no sense income-producing activities of the taxpayer. The persons who handled this clean-up work in the taxpayer's name were in the employ of the purchaser and other Bethlehem companies and they received their pay from those companies and not from the taxpayer. (R. 6a–7a.) That any so-called activities of the taxpayer in 1946 were actually activities of the purchaser Supply is evident from the fact that for over two years the taxpayer's balance sheet remained exactly the same as it was on January 2, 1946. (R. 7a–8a.)

Thus, during 1946, the taxpayer was a corporation in name only, without corporate substance and serving no real corporate purpose. The charter was merely kept in storage for possible future use in the Bethlehem Steel Corporation family of corporations. Under those circumstances, the taxpayer was correctly treated as a *de facto* dissolved corporation for the purpose of the two-year carry-back provision, and it would flout the intention of Congress to hold otherwise. The provision was originally designed for use only in cases where the credit was not needed in the tax year to offset normal earnings (S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 51–52); and, as already pointed

out, the provision was retained for a year beyond the repeal of the excess-profits tax itself in order "to be sure that business has the opportunity to apply reconversion expenditures to reduce wartime taxes" (S. Rep. No. 655, 79th Cong., 1st Sess., p. 19). Where, as in the instant case, the taxpayer had ceased to operate, there is no adequate basis for extending the benefits of the provision to such a nonoperating corporation.[6]

2. The taxpayer contends (Pet. 5–6) that the decision below is in conflict with decisions of other courts of appeals which, it is claimed, held that the carry-back provision is "mandatory" (Pet. 6). *Diamond A Cattle Co.* v. *Commissioner* (C. A. 10th), decided May 17, 1956 (1956 C. C. H., par. 9629); *Wier Long Leaf Lumber Co.* v. *Commissioner*, 173 F. 2d 549 (C. A. 5th); *Bowman* v. *Glenn*, 84 F. Supp. 200 (W. D. Ky.), affirmed, *per curiam*, 184 F. 2d 670 (C. A. 6th). None of these decisions, however, held that the credit carry-back must be allowed where the taxpayer is *de facto* dissolved. Each is distinguishable on its particular facts.

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[6] The fact that the taxpayer, after two years of complete business inactivity, had life blown into it and is presently engaged in the drydock business, does not serve to make it any the less *de facto* liquidated during the year 1946 when all of its assets had been reduced to an inter-company bank account and it had discontinued operating. It was during that year no more than a corporate shell. The subsequent revitalization of the taxpayer serves, as a matter of fact, to point out the reason that there was no *de jure* dissolution at the time of the *de facto* dissolution. At that time, the charter was stored away, to be subsequently used by the parent for any one of the multiple reasons for which the Bethlehem Steel Corporation would form a corporation.

In the *Diamond A Cattle Co.* case, *supra*, the taxpayer corporation until mid-1945 was engaged in extensive livestock business and some farming. It began to liquidate in August, 1945, by a transfer of all its assets to its sole shareholder. For the remainder of the year, its business consisted of paying a few debts and in winding up its affairs. Not finding any factual basis for determining the taxpayer *de facto* dissolved for the few months remaining in 1945, the Tenth Circuit held that the taxpayer was entitled to carry-back its unused excess-profits credit for 1945, the year in which it had been operating, to prior years.

Likewise, the Fifth Circuit in the *Wier* case, *supra*, came to a result completely in accord with the case at bar. In *Wier*, the question was whether a taxpayer which began liquidation in 1942 and continued in liquidation during 1943 and 1944 was entitled to the benefit of the unused excess-profits credit carry-back for 1943 and 1944. The court stated unequivocally that if it appeared that the corporation was a corporation in name and semblance only, without corporate substance and serving no real corporate purpose, it must, though not formally dissolved, be treated as dissolved *de facto*. Applying this standard, which is the same one adopted by the Third Circuit for its decision in the instant case, the Fifth Circuit allowed the carry-back for the year 1943 and disallowed a carry-back for 1944. It held that in 1943 the corporation (p. 552) "was still in form and in fact a corporation, still carrying on, in winding up, the business for which it was incorporated, still mak-

ing some, though small, profits, still engaged in necessary and orderly liquidation." As to the year 1944, however, the court held that the liquidation had progressed to the point where there was no longer any valid reason for delaying dissolution, and the corporation, although not dissolved *de jure*, was to be regarded as *de facto* dissolved.

The District Court in *Bowman* v. *Glenn*, *supra*, citing the *Wier* case, also looked to the actualities of the situation, and found that there were no facts presented in that case regarding the liquidation of a corporation to indicate that it was needlessly prolonged or purposely extended.

All of the cases cited by the taxpayer tend to support the position of the Commissioner that the mere fact that a corporation is not *de jure* dissolved is not in itself sufficient to allow to the corporation the benefits of the unused excess-profits credit carry-back under Section 710 (c) (3) (A). Rather, the courts will in each instance look to the realities of the situation, to the nature and extent of the activities of the corporation, and where a corporation remains a mere shell of no substance, as in this case, the benefits of the credit will be denied. See also *A B C Brewing Corp.* v. *Commissioner*, 224 F. 2d 483, 490 (C. A. 9).

CONCLUSION

The decision below is correct, there is no conflict in decisions, and no other reason appears which would warrant review. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1956.

APPENDIX

Internal Revenue Code of 1939:

SEC. 710 [as added by Sec. 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974]. IMPOSITION OF TAX.

(a) [as amended by Sec. 201 (a) of the Revenue Act of 1941, c. 412, 55 Stat. 687; Sec. 202 of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Imposition.*—

(1) *General rule.*—There shall be levied, collected, and paid, for each taxable year, upon the adjusted excess-profits net income, as defined in subsection (b), of every corporation (except a corporation exempt under section 727) a tax equal to whichever of the following amounts is the lesser:

* * * * *

(b) *Definition of Adjusted Excess Profits Net Income.*—As used in this section, the term "adjusted excess profits net income" in the case of any taxable year means the excess profits net income (as defined in section 711) minus the sum of:

* * * * *

(2) *Excess profits credit.*—The amount of the excess profits credit allowed under section 712; and

(3) [as amended by Sec. 2 (a) of the Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17, and Sec. 204 (a) of the Revenue Act of 1942, *supra*] *Unused excess profits credit.*—The amount of the unused excess profits credit adjustment for the taxable year, computed in accordance with subsection (c).

(c) [as added by Sec. 2 (b) of the Excess Profits Tax Amendments of 1941, *supra*, and amended by Sec. 204 (b) of the Revenue Act of

1942, *supra*, and by Sec. 122 (c) of the Revenue Act of 1945, c. 453, 59 Stat. 556] *Unused Excess Profits Credit Adjustment.*—

(1) *Computation of unused excess profits credit adjustment.*—The unused excess profits credit adjustment for any taxable year shall be the aggregate of the unused excess profits credit carry-overs and unused excess profits credit carry-backs to such taxable year.

(2) *Definition of unused excess profits credit.*—The term "unused excess profits credit" means the excess, if any, of the excess profits credit for any taxable year beginning after December 31, 1939, over the excess profits net income for such taxable year, computed on the basis of the excess profits credit applicable to such taxable year. For such purpose the excess profits credit and the excess profits net income for any taxable year beginning in 1940 shall be computed under the law applicable to taxable years beginning in 1941. The unused excess profits credit for a taxable year of less than twelve months shall be an amount which is such part of the unused excess profits credit determined under the first sentence of this paragraph as the number of days in the taxable year is of the number of days in the twelve months ending with the close of the taxable year. There shall be no unused excess profits credit for a taxable year beginning after December 31, 1946. The unused excess profits credit for a taxable year beginning in 1946 and ending in 1947 shall be an amount which is such part of the unused excess profits credit determined under the preceding provisions of this paragraph as the number of days in such taxable year prior to January 1, 1947, is of the total number of days in such taxable year.

(3) *Amount of unused excess profits credit carry-back and carry-over.*—

(A) *Unused Excess Profits Credit Carry-Back.*—If for any taxable year beginning after

December 31, 1941, the taxpayer has an unused excess profits credit, such unused excess profits credit shall be an unused excess profits credit carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such unused excess profits credit over the adjusted excess profits net income for the second preceding taxable year computed for such taxable year (i) by determining the unused excess profits credit adjustment without regard to such unused excess profits credit, and (ii) without the deduction of the specific exemption provided in subsection (b) (1).

* * * * *

(26 U. S. C. 1952 ed., Sec. 710.)

Treasury Regulations 112, promulgated under the Internal Revenue Code of 1939:

SEC. 35.710–1. *Scope of Tax.*—The excess profits tax is imposed upon the adjusted excess profits net income of every corporation, both domestic and foreign, for each income-tax taxable year beginning after December 31, 1939, except certain corporations which are exempt. (See section 727.) * * *

SEC. 35.710–2 [as amended by T. D. 5478, 1945 Cum. Bull. 262]. *Measure of Tax.* The adjusted excess profits net income upon which is based the excess profits tax for a taxable year is determined by deducting from the excess profits net income (determined under the provisions of section 711 applicable to such year) the sum of:

(a) The specific exemption applicable to such taxable year, as provided in section 710 (b) (1). See section 35.710–1.

(b) The excess profits credit allowed by section 712, and

(c) The unused excess profits credit adjustment (as defined in section 710 (c) (1)) con-

sisting of the aggregate of the unused excess profits credit carry-overs from each of the two preceding excess profits tax taxable years and the excess profits credit carry-backs from each of the two succeeding excess profits tax taxable years, computed as provided in section 710 (c).

* * * * *

SEC. 35.710-3 [as amended by T. D. 5386, 1944 Cum. Bull. 374; T. D. 5478, *supra;* and T. D. 5514, 1946-1 Cum. Bull. 173]: *Unused Excess Profits Credit Adjustment.*—(a) *Unused excess profits credit.*—The unused excess profits credit for any taxable year beginning after December 31, 1939, is the excess of the excess profits credit for the taxable year over the excess profits credit income, if any, for such taxable year. In the case of a taxpayer entitled to use the excess profits credit based on income or the excess profits credit based on invested capital, the credit which results in the larger unused excess profits credit is used. The excess profits net income is computed on the basis of the excess profits credit so used. * * *

* * * * *

A corporation may have an unused excess profits credit for a taxable year beginning in 1946, which may be carried back to the two preceding taxable years, even though no excess profits tax is imposed for such taxable year. The unused excess profits credit for a taxable year beginning in 1946 is to be computed in the same manner as though an excess profits tax were imposed for such taxable year. * * * There will be no unused excess profits credit for a taxable year beginning after December 31, 1946.

(b) *Unused excess profits credit adjustments.*—The unused excess profits credit adjustment is the aggregate of the portions of the unused excess profits credits for the two pre-

ceding and two succeeding taxable years which are treated under section 710 (c) (3) as unused excess profits credit carry-overs and unused excess profits credit carry-backs to the taxable year. Under the provisions of section 710 (c) (3) the unused excess profits credit for any taxable year beginning on or after January 1, 1942, is carried back to each of the two preceding taxable years (not considering as a preceding taxable year any taxable year beginning before January 1, 1941) and forms part of the unused excess profits credit adjustment for such preceding taxable year. There will be no unused excess profits credit carry-back from any taxable year beginning after December 31, 1946. The unused excess profits credit for any taxable year beginning after December 31, 1939, to the extent it is not used as a carry-back, is carried forward to the two succeeding taxable years and forms part of the unused excess profits credit adjustment for such of those succeeding taxable years as begin after December 31, 1940. The amount which is carried back or carried forward is limited in the case of each such preceding or succeeding taxable year to the portion of the unused excess profits credit which was not applied against excess profits net income (either as part of the excess profits credit carry-over in the case of a taxable year beginning in 1940 or as part of the unused excess profits credit adjustment in the case of a taxable year beginning after December 31, 1940) in determining the adjusted excess profits net income for the taxable years, if any, before such preceding or succeeding taxable year. The amount of the unused excess profits credit which was so applied is determined as follows: The adjusted excess profits net income is computed for each such taxable year without the specific exemption allowed by section 710 (b) (1) and without credit of any carry-over or carry-back from the taxable year in which such unused

excess profits credit arose or from any taxable year subsequent thereto. The unused excess profits credit, which is a carry-over or a carry-back to such taxable year, is considered to have been applied against the amount so computed. * * * The entire unused excess profits credit for any taxable year beginning after December 31, 1941, is carried back to the second preceding taxable year if such taxable year began after December 31, 1940. * * * If the second preceding taxable year began after December 31, 1940, the unused excess profits credit is carried back to the first preceding taxable year to the extent it exceeds the adjusted excess profits net income for the second preceding taxable year, such adjusted excess profits net income being computed without credit of the applicable specific exemption and without credit of any carry-back from the taxable year in which the unused excess profits credit arose. The unused excess profits credit is carried over to the first succeeding taxable year to the extent that it exceeds the aggregate of the adjusted excess profits net incomes for the two preceding taxable years (computed for each such taxable year without credit of the applicable specific exemption and without credit of any carry-back from the taxable year in which such unused excess-profits credit arose or of any carry-back from a taxable year subsequent thereto), not considering as a preceding taxable year any taxable year beginning prior to January 1, 1941. * * *

* * * * *

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